APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 86-2021

GEORGE W. HENGLEIN, L.C. ALBACKER, R.B. ANDREWS, R.L. APPELDORN, R.H. ASHENBAUGH, A.L. AUSTIN, J.W. BAGOSI, J.D. BALSER, A. BARRASSO, J.O. BAUER, E.E. BEST, H.W. BIGLEMAN, C.R. BLAZIER, J.P. BRESSANELLI, G.D. BROWN, F.C. BUCHHOLZ, E.C. CALVIN, R.R. CAMPBELL, P.D. CASTELLANO, J.L. CERASI, E. CHAPMAN, S. CHRISTY, T.M. COSTELLO, C.A. DAUKA, A.J. DECOSTA, M.G. DEGRANDE, A.S. DICCIO, A.P. DIMARZIO, C.J. DIMARZIO, R.J. DOUGHERTY, M. DRUGA, E.P. ERATH, E.P. FAHNERT, H. FARRINGTON, M. FERLAINO, R.D. FEYDO, E.R. FINGER, J.N. FLARA, N.E. FREDERICK, J.P. FRENN, R.E. FRONKO, L.L. GIBBS, W.L. GLEASON, L.E. GORDON, R.W. GOTT, J.E. GRIMM, P.E. GRUBBS, E.R. GUERRA, A.J. GULUTZ, J.T. HAAF, J.D. HAMACHER, P.J. HANNON, R.M. HANSEN, M.I. HARPHAM, D.H. HELDMAN, J.K. HILE, R.S. HOGSETT, R.T. HOPPER, H.M. HOWELL, W.M. HYAMS, J.M. JANKE, C.L. JOBE, JR., K.H. JOHNS, R.O. JOHNSON, JR., E.T. JONES, R. KAO, D.P. KERR, JR., P.A. KEYS, R.W. KNALLAY, E.E. KNAPEK, W.J. KOFALT, S.W. KOHLER, T. KOMINITSKY, T.R. KRUPA, P.R. KULLEN, J.R. KUNDICK, W. LAKE, D.F. LAVENE, T.T. LEHMANN, R.H. LEWIS, R.A. LIPPERT, W.R. LIVINGSTON, J.H. LUTTON, A.J. LYNN, D.B. MCCLAIN, J.L. MCKAIN, P.F. MCNICOL, E.L. MARSH, F.S. MATSUKAS, H.J. MERCER, A.R. MIDDLETON, M. MITROVICH, M.A. MOLCHAN, R.A. MONTGOMERY, R.T. MORELLI, A.N. MORRISON, H. MRAUNAC, M.R. MUCKIAN, C.W. MURRAY, III, C.J. MYERS, L.V. NAGLE, D.A. NOBERS, J.A. NUZO, E. ORDICH, W.H.ORR, T.H. PARSONS, A.J. PASKO, JR., H.S. PEASE, III, G.J.

PESCION, G.V. PETERSON, J.J. POPP, G.P. PORTO, G. POSTICH, D.E. POWELL, R.W. PRENTICE, J.V. PRESUTTI, W.C. PRICE, L.E. RAYNOVICS, T.R. REED, J.W. REIDER, J.J. ROSE, A.J. ROSEPILLER, C.S. RUSSELL, K.E. SANDERS, M.A. SARVER, P.K. SCHAKE, J.W. SCHOLTZ, A.H. SCHELINE, M.L. SHERRY, F.R. SHUSS, W.W. SIMPSON, A.E. SIX, J.E. SMITH, E.H. SPAZIANI, W.H. STEPHENS, C.D. STROSNIDER, J.F. SUFFOLETTA, H.L. TAYLOR, K.E. THOMAS, F.S. THORNBERRY, JR., J.R. TICE, D.A. TOWNLEY, R. TRBOVICH, R.T. TURNER, H.B. VAN FOSSEN, R.R. VLAH, A. VRANES, S. VRANES, D.W. WARE, K.G. WASSMAN, JR., G.T. WEEKLEY, E.M. WERRIES, JR., D.L. WESTFALL, J.A. WHITEHEAD, R.J. WHITTEN, C.K. WILDMAN, T. WILLIAMS, JR., T.H. WILLS, JR., A.J. YANNI, L.H. YOUNG, JR., R.C. YOUNG, H.F. YUTE, W.I. ZAZWIRSKY, AND JOHN K. DOUGLAS,

Plaintiffs,

VS.

COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES,

Defendant.

August 5, 1997

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Introduction

The plaintiffs claim benefits from the Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees ("Colt") allegedly due under its terms pursuant to ERISA, § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

The Court has jurisdiction based upon § 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974

("ERISA"), 29 U.S.C. § 1132(a)(1)(B) and § 502(e) of ERISA, 29 U.S.C. § 1132(e).

This case has been before the Court of Appeals for the Third Circuit four times.[1] *Schake v. Colt Indus.*, 791 F.2d 920 (3d Cir. 1986); *Henglein v. Informal Plan for Plant Shutdown Benefits*, 974 F.2d 391 (3d Cir. 1992) (*Henglein I*); *Henglein v. Colt Indus. Operating Corp. Informal Plan for Plant Shutdown Benefits*, No. 93-3219 (3d Cir. Jan. 13, 1994) (*Henglein II*)); and *Henglein v. Colt Indus. Operating Corp. Informal Plan for Plant Shutdown Benefits*, No. 94-3074 (3d. Cir. Sept. 26, 1994) (*Henglein III*).

Following the remand by the Court of Appeals in *Henglein III*, this case was reassigned to this member of the Court for disposition.

This proceeding has been rather contentious. Moreover, both plaintiffs and defendant have urged the Court to ignore prior rulings of the Court of Appeals for the Third Circuit in this case or in related litigation, *e.g.*, the defendant asserts: (i) that this Court has no jurisdiction; and (ii) that the Court of Appeals incorrectly ruled that the claim of the plaintiffs that a plan existed in 1982 under which they were entitled to benefits must be resolved under ERISA if the plan existed at the time the benefits were denied. Similarly, plaintiffs assert that the Court of Appeals for the Third Circuit in *Frank v. Colt Indus., Inc.*, 910 F.2d 90, 95 (3d Cir. 1990) erroneously found that forms filled out by a Colt personnel representative during each employee's exit interview indicated that plaintiffs there (with the exception of Schake, Frank and Henglein) were to receive "severance pay" as provided in their continuance agreements.

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[1] There was also related litigation involving claims for severance pay pursuant to ERISA. *Anthuis v. Colt Indus. Operating Co.*, 971 F.2d 999 (3d Cir. 1992) (Midland employees' claim for severance pay under ERISA); *Frank v. Colt Indus.*, 910 F.2d 90 (3d Cir. 1990).

Based on the stipulations of the parties and the evidence adduced at evidentiary hearings held before the Court, the Court makes the following Findings of Fact:[2]

Findings of Fact

UNCONTESTED FINDINGS OF FACT [3]

HISTORY OF THE CASE

1. All proceedings occurring subsequent to this Court's entry of its order in Colt Industries. Inc. v. John F. Frenn and Edwin L. March, United States District Court for the Western District of Pennsylvania, C.A. No. 86-2642, and prior to this date have dealt exclusively with the determination of whether or not plaintiffs have proved the existence of an ERISA covered employee benefit plan in 1982 and the terms, if any, of such a plan.

2. No court having jurisdiction to date has expressly held that the Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees has ever

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[2] Following the bench trial in this proceeding, the Court invited the parties to submit final proposed findings of fact and conclusions of law. The Court has adopted verbatim some of the parties' proposed findings of fact and has adopted parts of some proposed findings of fact after the same have been modified. The Court has determined that its findings of fact are supported by competent and credible evidence in the record.

The Court believes the procedure employed by it in reaching the findings of fact and conclusions of law contained herein satisfies both the interests of the parties and the legal system in arriving at a prompt adjudication under all of the circumstances of this complex case. *See, Lansford-Coaldale Water Auth. v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993) (Oral findings of the district court were not tainted because they were made orally, only a few hours after a long complex trial and were principally drawn verbatim from one of the defendant's proposed findings where the court did not request the parties to submit proposed factual findings after the close of the trial.)

[3] Pretrial Stipulation (p. 80 to 108), Document No. 250.

existed. Further, no terms of such a plan have been proven. Finally, the issue of whether the specific individual plaintiffs in this suit would qualify as participants under any terms which may be found to constitute such a plan has not been proven.

3. While the first opinion of this Court was based upon facts it had adduced from testimony of plaintiffs, there were no specific findings of fact or conclusions of law entered by this Court as part of its opinion and holdings from which appeal was taken in *Henglein I.*

4. In *Henglein I*, the Court of Appeals for the Third Circuit set forth generic criteria for courts of the Third Circuit to use in reviewing the proven facts to determine the existence of an employee benefit plan that would be covered by ERISA.

5. The result of the holdings and mandates of the Court of Appeals for the Third Circuit in *Henglein I* through *Henglein III* has been to vacate this Court's findings of fact and conclusions of law, opinions and orders as to Count I of plaintiffs' complaint and to direct this Court to determine whether the Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees existed in 1982 according to the criteria set forth in *Henglein I* and later modified in Henglein 111.

6. There is presently no record in this case, though prior sworn testimony in this case may be used in any manner permissible under the Federal Rules of Evidence.

IDENTITY OF PLAINTIFFS

7. The following individuals are plaintiffs in this lawsuit:

NAME	SOCIAL SECURITY NUMBER
Albacker, Lee C.	195-18-3236
Andrews, Richard B.	191-24-1614
Appeldorn, Robert L.	236-34-1989
Ashenbaugh, Ralph H.	191-20-8772

Austin, Albert L.		314-10-7284
Bagosi, Joseph W.		204-16-0662
Balser, Jack D.		208-26-3310
Barrasso, Albert		413-18-6697
Bauer, James 0.		191-12-3958
Best, Jr., Ezra E.		202-14-8683
Bigleman, Howard W.		173-24-2454
Blazier, Charles R.		194-14-2282
Bressanelli, Jerome P.		160-30-6056
Brown, George D.		197-22-5296
Buchholz, Frank C.		722-18-3341
Calvin, Jr., Elmer C.		176-20-8619
Campbell, Jr., Robert R.		292-30-2689
Castellano, Patsy D.		200-12-1581
Cerasi, James L.		211-30-6732
Chapman, Earl		202-24-3185
Christy, Stephen		187-28-2232
Costello, Thomas M.		184-26-2070
Dauka, Costa A.		300-30-8550
Decosta, A.J.		066-16-6221
Degrande, Maurice G.		347-14-2352
Diciccio, Anthony S.		202-24-8344
Dimarzio, Antonio P.		202-14-9634
Dimarzio, Carl J.		208-26-2939
Dougherty, Robert J.	1	83-24-1222
Douglas, John K.		300-30-5858
Druga, Michael		191-20-1563
Erath, Edwin P.		176-20-8280
Fahnert, Edward P.		296-24-8381
Farrington, Harry		185-12-4613
Ferlaino, Marion D.		283-24-5663
Feydo, Richard D.		184-32-0064
Finger, Eugene R.		167-26-5282
Flara, John N.		722-16-4282
Frederick, Norman E.		175-26-9756
Frenn John P.		197-14-8368

Fronko, Richard E.	167-22-4561
Gibbs, Leroy L.	167-22-2293
Gleason, William L.	201-14-8184
Gordon, Leroy E.	169-01-8874
Gott, Robert W.	301-24-4550
Grimm, John E.	169-28-4780
Grubbs, Paul E.	182-28-1185
Guerra, Ernest R.	178-26-6297
Gulutz, Anthony J.	292-28-8476
Haaf, John T.	112-20-0293
Hamacher, Jr., Joseph D.	371-34-4608
Hannon, Peter J.	032-14-5666
Hansen, Richard M.	160-28-9110
Harpham, Malcolm 1.	167-34-4494
Heldman, Donald H.	270-32-6850
Henglein, George W.	180-26-3111
Hile, Jack K.	301-28-9517
Hogsett, Ralph S.	162-16-6631
Hopper, Ronald T.	283-28-1682
Howell, Herman M.	281-32-3606
Hyams, William H.	183-26-9213
Janke, Kenneth M.	503-44-7425
Jobe, Jr., Charles L.	184-32-0581
Johns, Kenneth H.	184-24-6411
Johnson, Jr., Robert 0.	160-28-9136
Jones, Eugene	190-26-9358
Kao, Robert	412-44-1300
Kerr, Jr., Dallas P.	202-24-7666
Keys, Patricia A.	233-46-8946
Knallay, Raymond W.	195-30-0271
Knapek, Ernst E.	199-26-9028
Kofalt, William J.	195-30-0586
Kohler, Samuel W.	272-34-1793
Kominitsky, Theodore	195-28-1950
Krupa, Theodore R.	178-26-2702
Kullen, Peter R.	187-14-1261

Kundick, John R.	174-22-7957
Lake, Walter	191-24-1711
Laneve, David F.	301-28-9541
Lehmann, Theodore T.	273-20-0445
Lewis, Richard H.	294-30-0597
Lippert, Robert A.	178-26-0980
Livingston, William R.	167-22-2806
Lutton, John H.	194-14-1389
Lynn, Andrew J.	287-36-0888
Marsh, Edwin L.	185-14-1434
Matsukas, Frank S.	208-20-4550
McClain, Daniel B.	165-32-7171
McKain, John L.	235-24-9715
McNicol, Patrick F.	301-22-4937
Mercer, Homer J.	234-38-4356
Middleton, Allen R.	202-14-9254
Mitrovich, Max	211-28-8189
Molchan, Michael A.	281-12-0750
Montgomery, Ronald A.	298-36-5167
Morelli, Robert T.	103-01-0655
Morrison, Albert N.	207-16-6601
Mraunac, Helen	187-14-4543
Muckian, M. Rita	192-18-3296
Murray, III, Charles W.	162-24-6081
Myers, Carl J.	160-28-9046
Nagle, Jr., Lawrence V.	380-22-0589
Nobers, David A.	184-30-6084
Nuzzo, John A.	202-24-8445
Ordich, Esther B.	233-34-4481
Orr, William H.	199-12-9098
Parsons, Tbomas H.	296-14-6198
Pasko, Jr., Anthony J.	328-34-4605
Pease, 111, Harry S.	301-22-7204
Pescion, Grayce C.	236-20-3695
Peterson, George V.	204-22-8619
Popp, William J.	183-24-4552

Porto, Gasper P.	184-24-6113
Postich, George	167-22-3508
Powell, Donald E.	192-12-9432
Prentice, Ronald W.	199-26-5807
Presutti, Jesse V.	167-22-7143
Price, William C.	195-30-0141
Raykovics, Lawrence E.	188-22-6815
Reed, Thomas R.	281-34-2858
Reider, John W.	167-22-1287
Rose, Mary Jo	293-38-1834
Rosepiler, Anthony J.	167-22-5939
Russell, Charles S.	273-28-3557
Sanders, Kenneth E.	308-24-5724
Sarver, Margaret A.	194-26-0890
Schake, Paul K.	203-22-2030
Scholtz, John W.	169-30-9196
Sheline, Audrey H.	159-24-2784
Sherry, Mary L.	208-20-0397
Shuss, F.R.	197-22-8954
Simpson, William W.	182-14-5039
Six, Arnold E.	232-64-5408
Smith , John E.	188-18-5515
Spaziani, Emidio H.	291-26-6818
Stephens, William H.	200-20-7960
Strosnider, C. Dean	191-20-8150
Suffoletta, Jerry F.	203-28-0722
Taylor, Henry L.	202-14-9206
Thomas, Keith E.	285-30-9641
Thomberry, Jr., Frank S.	300-30-5082
Tice, James R.	284-32-8721
Townley, Donald A.	281-34-2762
Trbovich, Robert	302-34-1090
Turner, Ralph T.	270-32-5193
Van Fossen, Harry B.	301-24-8053
Vlah, Robert R.	183-28-4902
Vranes, Alexander	194-14-1525

Vranes, Sylvester R.	194-14-1526
Ware, Jr., Donald W.	175-28-8921
Wassman, Jr., Karl G.	201-18-6975
Weekley, Gary T.	72-34-1090
Werries, Jr., Edmund M.	207-18-4068
Westfall, David L.	235-48-8760
Whitehead, John A.	201-14-1010
Whitten, Robert J.	175-20-9618
Wildman, Carl K.	233-42-3822
Williams, Jr., Thomas	255-42-8754
Wills, Jr., Thomas H.	198-24-9468
Yanni, Anthony J.	280-20-1706
Young, Jr., Louis H.	211-28-8691
Young, Ronald C.	195-30-0537
Yute, Homer F.	172-26-4127
Zazwirsky, William I.	189-28-6191

DESCRIPTION OF PLAINTIFFS

8. The plaintiffs are not members of an alleged or certified class.

9. The plaintiffs are all former salaried non-union employees of Crucible, Inc., formerly Crucible Steel Corporation, formerly Cru Colt Corporation, formerly Crucible Steel Corporation, formerly Cru Del Corporation, formerly Crucible Steel Company of America. In December 1982, Crucible, Inc., changed its name to Colt Industries Operating Corporation.

10. Ninety-seven of the 164 plaintiffs held positions covered by the terms of collectively bargained agreements between the United Steelworkers of America and Crucible, Inc., before they became salaried non-union employees of Crucible, Inc.

11. As salaried non-union employees, the background terms and conditions of plaintiffs' employment were governed by principles of at-will employment under Pennsylvania law.

12. In 1982, the plaintiffs were all employed as salaried non-union employees associated with Crucible, Inc.'s specialty steel and alloy production and manufacturing facilities in Midland, Pennsylvania, and Lawrenceville, Pennsylvania, and various support facilities located in Robinson Township, Pennsylvania.

13. Each of the plaintiffs' employment as Crucible, Inc., salaried non-union employees terminated at various dates between March 1982 and June 1986.

14. The information about the plaintiffs contained in Defendant's Summary Evidence Exhibits W-1 through W-36, inclusive, is true and accurate.

IDENTITY OF THE DEFENDANT

15. The Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees is the sole remaining defendant in this lawsuit.

16. The Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees would be a separate entity, if it existed at all, any time after September 2, 1974.

17.Crucible, Inc., its predecessors, and its successors, are not defendants in this lawsuit in any capacity.

18. Colt Industries, Inc., its predecessors, and its successors, are not defendants in this lawsuit in any capacity.

IDENTITY OF THE CLAIM

19. The plaintiffs' sole claim is to recover benefits from the Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees under its terms, pursuant to ERISA, 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

a. The plaintiffs claim that the Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits

for Salaried Employees was an existing defined benefit employee pension plan in 1982.

b. The plaintiffs claim that a 1968 document entitled "Early Severance and Disability Benefit Program," as allegedly amended, constitutes the terms and conditions of the Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees.

c. The plaintiffs are bringing individual claims to recover benefits under the terms of the Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees.

20. The plaintiffs do not bring in this lawsuit any other ERISA claims against the defendant.

21. The plaintiffs do not bring in this lawsuit any ERISA claim against Crucible, Inc., in any capacity; Colt Industries, Inc., in any capacity; any agent of Crucible, Inc., or Colt Industries, in any capacity; or any other individual or entity, in any capacity.

22. The plaintiffs do not claim in this lawsuit that Colt Industries, Inc., as Crucible, Inc.'s sole shareholder, did anything which would cause a court to disregard Crucible, Inc.'s separate corporate existence.

23. The plaintiffs do not bring in this lawsuit any state-law claims, contractual or otherwise, against the defendant or any other individual or entity, in any capacity.

24. The plaintiffs do not claim in this lawsuit that state law controls any act, omission, or event that occurred after September 2, 1974.

25. The plaintiffs do not claim in this lawsuit that, after September 2, 1974, Crucible, Inc., or any of its predecessors or successors had a state law contractual obligation to provide benefits in any form to the plaintiffs.

26. The plaintiffs do not claim in this lawsuit that Crucible, Inc., or any of its predecessors or successors ever had any obligation, under any law, to establish and maintain any employee benefit plan that would provide benefits in any form to the plaintiffs.

27. The plaintiffs do not claim in this lawsuit that, after September 2, 1974, Colt Industries, Inc., or any of its predecessors or successors had a state law contractual obligation to provide benefits in any form to the plaintiffs.

28. The plaintiffs do not claim in this lawsuit that Colt Industries, Inc., or any of its predecessors or successors ever had any obligation, under any law, to establish and maintain any employee benefit plan that would provide benefits in any form to the plaintiffs.

29. The plaintiffs do not claim in this lawsuit that the 1975 Salaried Retirement Plan for Eligible Employees of Crucible, Inc., is not currently or will not in the future provide them with all benefits available to them under the terms of that plan.

30. The plaintiffs do not claim in this lawsuit that any fiduciary or administrator of the 1975 Salaried Retirement Plan for Eligible Employees of Crucible, Inc., violated any provision of ERISA.

HISTORY OF CRUCIBLE, INC.

31. 1900, Crucible Steel Company of America incorporated under New Jersey law.

32. Prior to 1968, Crucible Steel Company of America had reorganized, sold, or closed several of its operations. In the process of these reorganizations, sales, and closings, Crucible Steel Company of America eliminated some of its salaried non-union positions. Crucible Steel Company of America

transferred some of its salaried non-union employees from these positions to other operations and terminated the employment of the rest.

a. In 1958, Crucible Steel Company of America acquired full ownership of, reorganized, and merged with Rem-Cru, Inc., a former partly-owned subsidiary with facilities in Midland, Pennsylvania.

b. In 1960, Crucible Steel Company of America closed its "Park Works" facilities, located in Pittsburgh, Pennsylvania.

c. In 1963, Crucible Steel Company of America closed its research laboratory, located in Midland, Pennsylvania.

d. In 1965, Crucible Steel Company of America closed its "National Draw" facilities, located in Midland, Pennsylvania.

e. In 1966, Crucible Steel Company of America closed its "Defense Plant" facilities, located in Midland, Pennsylvania.

f. In 1967, Crucible Steel Company of America closed its 12-18 inch mill, located in Midland, Pennsylvania.

g. In 1968, Crucible Steel Company of America closed its open hearth and the open hearths chemical laboratory, located in Midland, Pennsylvania.

33. As of 1968, Crucible Steel Company of America was headquartered at Four Gateway Center in Pittsburgh, Pennsylvania.

34. As of 1968, Crucible Steel Company of America was a wholly-independent, fully-functioning corporation and it marketed recognized products manufactured by its divisions.

a. Crucible Steel Company of America owned and operated specialty steel and alloy production and manufacturing facilities in Midland, Pennsylvania ("Midland

Division," later "Stainless Steel Division" and "Alloy Division"); Harrison, New Jersey ("Spaulding Plant"—later part of "Midland Division"); Geddes, New York ("Syracuse Division," later "Specialty Metals Division"); Lawrenceville, Pennsylvania ("Spring Division"); East Troy, Wisconsin ("Trent Tube Division"); Fullerton, California ("Fullerton Plant"—part of "Trent Tube Division"); Carrolton, Georgia ("Carrolton Plant"—part of "Trent Tube Division"); and Breman, Georgia ("Haralson Plant").

b. Crucible Steel Company of America owned and operated ceramic magnet production and manufacturing facilities in Elizabethtown, Kentucky ("Magnet Division").

c. Crucible Steel Company of America owned and operated a research laboratory in Robinson Township, Pennsylvania ("Research Laboratory," later "Crucible Materials Research Center").

d. Crucible Steel Company of America was organized in a centralized, functionally integrated structure.

e. Each employee of Crucible Steel Company of America, salaried non-union and union, reported directly to or ultimately to one of six department heads.

(1) Crucible Steel Company of America employed salaried non-union employees at each of its specialty steel and alloy and ceramic magnet production and manufacturing facilities and at its research laboratory.

(2) Crucible Steel Company of America employed union employees, organized into various Local Unions of the United Steelworkers of America, at each of its specialty steel, alloy, and tube production and manufacturing facilities; Crucible Steel Company of America employed union employees, organized

into various other unions not affiliated with the United Steelworkers of America, at each of its other facilities.

(3) The collective bargaining agreements that Crucible Steel Company of America negotiated with various Local Unions of the United Steelworkers of America representing employees at Midland, Pennsylvania, Geddes, New York, and Pittsburgh, Pennsylvania, were commonly known as "Gotham Group Agreements"; the fringe benefits provided under these agreements were generally identical to the fringe benefits negotiated between the nation's largest carbon steel producers and the United Steelworkers of America in what were commonly known as "Big Steel Agreements." The collective bargaining agreements that Crucible Steel Company of America negotiated with various Local Unions of the United Steelworkers of America representing employees at its other locations were not patterned in any way off of the Big Steel Agreements.

35. During 1968, Crucible Steel Company of America issued a $30 million bond; reincorporated under Delaware law; and changed its name first to Cru Del Corporation, then Crucible Steel Corporation.

36. During 1968, Crucible Steel Corporation reorganized into a decentralized structure in which each principal production and manufacturing facility constituted a separate division that marketed its own products and reported its own profits and losses.

a. As a consequence of this reorganization, Crucible Steel Corporation closed its headquarters offices at Four Gateway Center and began to relocate some portions of its headquarters to Midland, Pennsylvania, and other portions of its headquarters to Robinson Township,

Pennsylvania; thereafter, each of Crucible's operating divisions contained its own personnel and finance departments.

b. Under the reorganized structure, each employee of Crucible Steel Corporation, salaried non-union and union, reported directly to or ultimately to the President of the local operating division where he or she worked. The President of each operating division in turn reported directly to Crucible, Inc.'s Group Vice President, who controlled all of the operating divisions and made all decisions pertaining to Crucible Inc.'s business and operations in accordance with the directions of Crucible, Inc.'s Board. Crucible, Inc.'s Group Vice President reported to Crucible, Inc.'s President.

37. In 1968, through a series of transactions, Crucible Steel Corporation consolidated with but *de facto* became a wholly-owned subsidiary of Colt Industries, Inc., and changed its name first to Cru Colt Corporation, then Crucible Steel Corporation, then Crucible, Inc.

a. In August 1968, Crucible Steel Corporation created a wholly-owned subsidiary, Cru Colt Corporation, incorporated under Delaware law, and transferred substantially all of its assets and liabilities to Cru Colt Corporation; thus Crucible Steel Corporation became a holding company, owning all of the outstanding stock of Cru Colt Corporation.

b. On August 15, 1968, Crucible Steel Corporation and Colt Industries, Inc., entered into a Plan and Agreement of Consolidation.

c. On the same date, Crucible Steel Corporation, Cru Colt Corporation and Colt Industries, Inc., entered into a Three-Party Agreement.

d. In September 1968, by order of the Board of Directors of Crucible Steel Corporation pursuant to the Three-Party Agreement, the Secretary of Crucible Steel Corporation sent to the registered stockholders of Crucible Steel Corporation a 1968 Colt Industries, Inc.—Crucible, Inc. (sic) Joint Proxy Statement, with copies of the written agreements attached; at the same time, the Secretary of Colt Industries, Inc., sent the same materials to the registered shareholders of Colt Industries, Inc.

(1) Anyone who owned shares in either Crucible Steel Corporation or Colt Industries, Inc., registered in their individual name as of the record date set forth in the Proxy Statement, received a copy of the 1968 Colt Industries, Inc.—Crucible Steel Corporation Joint Proxy Statement.

(2) The purposes of the Joint Proxy Statement were to inform the shareholders of both Crucible Steel Corporation and Colt Industries, Inc., of the terms of the proposed consolidation of Colt Industries, Inc., and Crucible Steel Corporation and to solicit the shareholders' proxies in compliance with the secureities laws of the United States and the various states.

e. In October 1968, the stockholders of Crucible Steel Corporation and the stockholders of Colt Industries, Inc., separately approved these transactions by separate shareholder votes.

(1) Crucible Steel Corporation and Colt Industries consolidated into a new corporation, New Colt.

(a) The final consolidation transaction, in and of itself, had no actual effect on any of the former Crucible Steel Corporation's employee benefit plans, funds, or programs, except to the extent that it terminated certain of Crucible Steel Corporation's

stock option plans and amended some of Crucible Steel Corporation's other plans to make them applicable to its operations as the new Colt Industries, Inc.'s wholly-owned subsidiary.

(b) The final consolidation transaction transferred the former Colt Industries, Inc.'s employee benefit plans to the newly created Colt Industries, Inc.

(2) Cru Colt Corporation therefore became a wholly-owned subsidiary of New Colt.

(3) Cru Colt Corporation changed its name to Crucible Steel Corporation.

(4) New Colt changed its name to Colt Industries, Inc.

(5) Crucible Steel Corporation changed its name to Crucible, Inc.

38. Subsequent to the consolidation, Crucible, Inc., operated as a separate and distinct entity from its parent, Colt Industries, Inc.

a. Crucible, Inc., controlled the day-to-day operation of its specialty steel and alloy manufacturing and production facilities.

b. Crucible, Inc., followed all necessary corporate formalities required under its charter, by-laws, and Delaware law.

39. Between 1968 and 1982, Crucible, Inc., opened some operations and reorganized, sold, or closed other operations. In the process of each of these reorganizations, sales, and closings, Crucible, Inc., eliminated some of its salaried non-union positions. Crucible, Inc., transferred some of its salaried-non-union employees from these positions to other operations and terminated the employment of the rest.

a. In 1968, Crucible, Inc., completed the closing of its headquarters offices at Four Gateway Center, Pittsburgh, Pennsylvania.

b. In 1970, Crucible, Inc., closed its forge stock mill, located in Midland, Pennsylvania.

c. In 1972 to 1973, Crucible, Inc., closed its Spaulding Plant, located in Harrison, New Jersey.

d. In 1974, Crucible, Inc., opened its Crucible Compaction Metals Operation, located in North Fayette Township, Pennsylvania.

e. In 1980, Crucible, Inc., closed its coke plant and coke plant chemical laboratory, located in Midland, Pennsylvania.

f. In 1981, Crucible, Inc., closed its blast furnace, located in Midland, Pennsylvania.

g. In 198 1, Crucible, Inc., closed its foundry, located in Midland, Pennsylvania.

h. In 1981, Crucible, Inc., closed its top oxygen converter in Midland, Pennsylvania.

i. In October 1982, Crucible, Inc., closed all of its specialty steel and alloy production and manufacturing facilities located in Midland, Pennsylvania, and previously operated as Crucible, Inc.'s Stainless Steel and Alloy Divisions.

(1) On March 10, 1982, Colt Industries, Inc., as Crucible, Inc.'s sole shareholder, publicly announced that it would sell or close Crucible, Inc.'s specialty steel and alloy production and manufacturing facilities in Midland, Pennsylvania.

(2) In June 1982, negotiations to sell as an on-going business Crucible, Inc.'s specialty steel and alloy

production and manufacturing facilities in Midland, Pennsylvania, to Cyclops Steel Corporation broke down.

40. In December 1982, Crucible, Inc., changed its name to Colt Industries Operating Corporation.

41. In 1983, Colt Industries Operating Corporation transferred or closed all of its operations and ceased doing business. In the process of each of these sales and closings, Colt Industries Operating Corporation eliminated all of its salaried non-union positions, except for those positions required for the winding down of the company's business. By the end of 1986, Colt Industries Operating Corporation had terminated the employment of all but three of its salaried non-union employees; the remaining three employees kept the company's records until their termination in 1993.

a. In 1983, Crucible, Inc., closed all of its specialty steel and alloy production and manufacturing facilities located in Pittsburgh, Pennsylvania, and previously operated as Crucible, Inc.'s Spring Division.

b. In 1983, Crucible, Inc., sold or closed all of its remaining facilities, located in Geddes, New York; North Fayette Township, Pennsylvania; East Troy, Wisconsin; Fullerton, California; Carrolton, Georgia; Breman, Georgia; Elizabethtown, Kentucky; and Robinson Township, Pennsylvania, and previously operated as Crucible, Inc.'s Specialty Metals Division; Compaction Metals Operation; Trent Tube Division; Magnet Division; and Crucible Materials Research Center.

42. Today, Colt Industries Operating Corporation is a dormant corporation.

CHRONOLOGY OF EVENTS ALLEGED TO RELATE TO CRUCIBLE, INC.'S ESTABLISHMENT AND MAINTENANCE OF THE COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES

43. In 1947, Crucible, Inc., adopted a retirement plan for salaried non-union employees, incorporated its terms in writings, and periodically rewrote and amended it.

44. Effective July 1, 1962, Crucible Steel Company of America adopted an Early Severance and Disability Benefit Program.

a. Crucible Steel Company of America incorporated the terms and conditions of the Early Severance and Disability Benefit Program in a July 10, 1962 memorandum from W.H. Knoell regarding "Early Severance and Informal Disability Benefit" and later explained these terms and conditions in an October 19, 1962 memorandum from W.H. Knoell regarding "Early Severance and Disability Benefit Program."

(1) The 1962 W.H. Knoell Memoranda were addressed and distributed to the six Vice Presidents in charge of Crucible Steel Company of America's functionally integrated departments and to those salaried non-union employees who in 1962 worked in the personnel department (including the benefits unit and the labor unit) or the finance department (including the accounting unit and the data processing unit) of each operating division.

(2) The 1962 W.H. Knoell Memoranda were not generally distributed to the plaintiffs (including in particular those plaintiffs who were members of the class of salaried non-union employees in 1962).

b. On August 22, 1962, Crucible Steel Corporation of America adopted the 1962 Early Severance and Disability Benefit Program by a Board of Directors resolution.

45. On August 28, 1968, the terms and conditions of Crucible Steel Corporation's Early Severance and Disability Benefit Program were amended, completely rewritten, and incorporated in a 1968 document entitled "Early Severance and Disability Benefit Program," over the signature of E.C. Gendron.

a. During 1968, the 1968 document entitled "Early Severance and Disability Program" was internally distributed to or otherwise communicated to the Presidents of each of Crucible Steel Corporation's operating divisions and to those salaried non union employees who in 1968 worked in the personnel department (including the benefits unit and the labor unit) or the finance department (including the accounting unit and the data processing unit) of each operating division.

b. The December 18, 1968 E.A. Mach memorandum [4] was internally distributed to the Presidents of Crucible, Inc.'s Stainless Steel and Alloy Divisions.

c. The December 18,1968 E.A. March Memorandum was not generally distributed to the plaintiffs (including in particular those plaintiffs who were members of the class of salaried non-union employees in 1968).

d. On May 16, 1969, Crucible, Inc., ratified by a Board of Directors resolution the terms of the 1968 document entitled "Early Severance and Disability Benefit Program," as to any benefits already fully approved under its terms.

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[4] *See* ¶ 106.

46. Effective February 10, 1969, Crucible, Inc., amended and completely rewrote its Early Severance and Disability Benefit Program.

a. Crucible, Inc., incorporated the terms and conditions of the Early Severance and Disability Benefit Program in a 1969 document entitled "Hardship Retirement Guidelines."

(1) The 1969 document entitled "Hardship Retirement Guidelines" was internally distributed or otherwise communicated to the Presidents and Personnel Directors of each of Crucible, Inc.'s operating divisions and to those salaried non-union employees who in 1969 worked in the personnel department (including the benefits unit and the labor unit) or the finance department (including the accounting unit and the data processing unit) of each operating division.

(2) The 1969 document entitled "Hardship Retirement Guidelines" and any related memoranda were not generally distributed to plaintiffs (including in particular those plaintiffs who were members of the class of salaried non-union employees in 1969).

b. Crucible, Inc., as employer, never issued to its salaried non-union employees in general any formal written notice that the company had completely rewritten the Early Severance and Disability Benefit Program in 1969 and adopted the 1969 Hardship Retirement Guidelines.

c. On May 16, 1969, Crucible, Inc., adopted by a Board of Directors resolution the 1969 Hardship Retirement Guidelines.

47. The October 22, 1971 R.W. Ahern and R.S. Barr Memorandum [5] was internally distributed to those individuals to whom it was addressed.

48. The October 22, 1971 R.W. Ahern and R.S. Barr Memorandum was not generally distributed to the plaintiffs (including in particular those plaintiffs who were members of the class of salaried non-union employees in 1971).

49. Effective December 1, 1972, Crucible, Inc., rescinded the Early Severance and Disability Benefit Program.

a. Crucible, Inc., rescinded the Early Severance and Disability Benefit Program by a December 1, 1972 Board of Directors resolution.

b. The January 26, 1973 E.A. March Memorandum [6] was internally distributed or otherwise communicated to the Presidents and Personnel Directors of Crucible, Inc.'s operating divisions and to those salaried non-union employees who in 1973 worked in the personnel department (including the benefits unit and the labor unit) or the finance department (including the accounting unit and the data processing unit) of each operating division.

c. The January 26, 1973 E.A. March Memorandum was not generally distributed to the plaintiffs (including in particular those plaintiffs who were members of the class of salaried non-union employees in 1973).

d. The March 16, 1973 E.A. March Memorandum [7] was internally distributed or otherwise communicated to the Presidents, Personnel Directors, and Controllers of Crucible, Inc.'s operating divisions and to those salaried

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[5] *See* ¶ 129

[6] *See* ¶ 138.

[7] *See* ¶ 143.

non-union employees who in 1973 worked in the personnel department (including the benefits unit and the labor unit) or the finance department (including the accounting unit and the data processing unit) of each operating division.

e. The March 16, 1973 E.A. March memorandum was not generally distributed to the plaintiffs (including in particular those plaintiffs who were members of the class of salaried non-union employees in 1973).

50. Crucible, Inc., took all corporate action required under and by the applicable corporation law and its by-laws to effectuate a rescission of the Early Severance and Disability Benefit Program, effective December 1, 1972. At no time thereafter did either the Board of Directors of Crucible or the Board of Directors of Colt Industries, Inc., ever take, either directly or indirectly, any action to undo the effect of Crucible, Inc.'s December 1, 1972 Board of Directors Resolution. Neither Board thereafter acted to establish any separate policy, plan, fund or program that was intended to or did specifically provide for payment of benefits to non-union salaried employees in the event of a closing of an operation, plant or department of Crucible, Inc.

51. At no time after December 1, 1972, did Crucible, Inc., commence payments to any former salaried non-union employee under the terms of any separate policy, plan, or program to specifically provide for payment of benefits to non-union salaried employees in the event of a closing of an operation, plant or department of Crucible, Inc.

52. At no time after December 1, 1972, did Crucible, Inc., or any management employee of Crucible, Inc., put into writing the terms of any separate policy, plan, or program to specifically provide for payment of benefits to non-union salaried employees in the event of a closing of an operation, plant or department of Crucible, Inc.

53. At no time after 1973 did Crucible, Inc., or any management employee of Crucible, Inc., refer in writing to the terms of or existence of any separate policy, plan, or program to specifically provide for payment of benefits to non-union salaried employees in the event of a closing of an operation, plant or department of Crucible, Inc.

54. Crucible, Inc., amended and rewrote its retirement plan for salaried non-union employees effective December 1, 1972, and incorporated its terms and conditions in a 1972 document entitled "Crucible, Inc. Retirement Plan for Eligible Salaried Employees." 33

a. The terms and conditions of the Crucible, Inc., Retirement Plan for Eligible Salaried Employees were summarized in a 1973 document entitled "Retirement Plan for Eligible Salaried Employees of Crucible, Inc. Summary Plan Description."

b. The 1972 document entitled "Retirement Plan for Eligible Salaried Employees of Crucible, Inc. Summary Plan Description" was printed in booklet form and distributed to all of Crucible, Inc.'s salaried non-union employees, in compliance with existing law.

55. A 1973 document entitled "TOTAL INCOME PROTECTION PLAN FOR ELIGIBLE CRUCIBLE EMPLOYEES" was distributed to the salaried non-union employees who attended a series of meetings during 1973.

56. The 1973 document entitled "TOTAL INCOME PROTECTION PLAN FOR ELIGIBLE CRUCIBLE EMPLOYEES" was an informational brochure informally summarizing salaried non-union employee benefits.

57. Crucible, Inc., amended and rewrote the Retirement Plan for Eligible Salaried Employees of Crucible, Inc., effective January 1, 1976, and incorporated its terms and conditions in a 1976 document entitled "The 1975 Salaried Retirement Plan for Eligible Employees of Crucible, Inc."

a. The terms and conditions of the 1975 Salaried Retirement Plan for Eligible Employees of Crucible, Inc., were summarized and set forth completely in a 1976 document entitled "1975 Salaried Retirement Plan for Eligible Employees of Crucible, Inc. Summary Plan Description."

b. The 1976 document entitled "1975 Salaried Retirement Plan for Eligible Employees of Crucible, Inc. Summary Plan Description" was printed in booklet form and distributed to all of the salaried non-union employees of Crucible, Inc., working at locations to which its terms applied, including Crucible, Inc.'s Stainless Steel and Alloy divisions in Midland, Pennsylvania, in compliance with existing law.

58. Copies of the August 1, 1976 Colt Industries, Inc. Policies and Procedures Number 74.1 regarding "EMPLOYEE BENEFITS (INSURANCE AND PENSION)" were internally distributed to a limited group of senior management employees, but only as part of a larger volume of policies and procedures.

59. Crucible, Inc., as employer, never issued to its salaried non-union employees in general any specific, separate written notice that the company had rescinded the Early Severance and Disability Benefit Program.

60. At no time after December 1, 1972, did Crucible, Inc. intend to establish and maintain any separate and distinct plan or program to provide salaried non-union employees with specific benefits in the event of a plant shutdown.

61. At no time did Crucible, Inc., ever establish and maintain any separate fund or account specifically to provide or secure the payment of any benefit to salaried non-union employees in the event of a plant shutdown.

CIRCUMSTANCES ALLEGED TO RELATE TO PLAINTIFFS' CLAIM FOR BENEFITS FROM THE COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES

62. As a consequence of the elimination of certain employment positions related to Crucible, Inc.'s operation of its specialty steel and alloy production and manufacturing facilities located in Midland, Pennsylvania, and Lawrenceville, Pennsylvania, and certain of the support facilities located in Robinson Township, Pennsylvania, Crucible, Inc., involuntarily terminated the employment of at least all but two of the plaintiffs.

63. No supervisor or other person in authority as to other employees of Crucible, Inc., has ever recommended or proposed nor has a Division President or Corporate Vice President or any Committee appointed by Crucible, Inc., ever approved that any one or more of the plaintiffs receive a specific benefit as a consequence of the elimination of certain employment positions related to Crucible, Inc.'s operation of its specialty steel and alloy production and manufacturing facilities located in Midland, Pennsylvania, and Lawrenceville, Pennsylvania, and certain of the support facilities located in Robinson Township, Pennsylvania.

Findings of Fact of the Court re:
Contested Issues of Fact and Adoption of Uncontested Facts

EVENTS LEADING TO THIS LITIGATION

64. In 1982, Crucible's sole shareholder, Colt Industries Operating Corporation ("Colt") announced that it would sell or close Crucible's Midland Division after negotiations between management and the United Steelworkers failed to result in a needed labor-cost-saving agreement. Plaintiffs all

separated employment from Crucible at various times after this announcement.

65. Shortly after Colt's announcement that it would sell or close Crucible's Midland Division, a group of Crucible's salaried employees, including 62 of the plaintiffs, signed a petition attached to a letter sent to Colt's Chairman, George Strichman. In this letter, the employees asked Colt to "consider amending the Midland separation program so that Management personnel affected by the sale or shutdown receive benefits comparable to Union personnel." As "evidence" of the type of amendments these employees desired, the employees referred to the past existence of an "Early Severance and Disability Benefit Program" and "Hardship Retirement Guidelines." Neither Colt nor Crucible further amended any of Crucible's existing benefit plans or established any new plans to provide the benefits the employees requested. This lawsuit and other litigation followed.

DESCRIPTION OF PLAINTIFFS

66. The plaintiffs are all former salaried non-union employees of Crucible, Inc., formerly Crucible Steel Corporation, formerly Cru Colt Corporation, formerly Crucible Steel Corporation, formerly Crucible Steel Company of America. In December 1982 Crucible, Inc., changed its name to Colt Industries Operating Corporation.

67. Ninety-seven of the 164 plaintiffs held positions covered by the terms of collectively bargained agreements between the United Steelworkers of America and Crucible, Inc., before they became salaried non-union employees of Crucible, Inc.

68. In 1982, the plaintiffs were all employed as salaried non-union employees associated with Crucible, Inc.'s stainless steel and alloy production and manufacturing facilities in

Midland, Pennsylvania, and various support facilities located in Robinson Township, Pennsylvania.

69. Each of the plaintiffs' employment as Crucible, Inc., salaried non employees terminated at various dates between March 1982 and June 1986.

70. Upon the termination of his or her employment, each plaintiff was advised by Crucible, Inc., personnel that he or she would not receive the benefits sought by the plaintiffs in this proceeding.

71. One hundred fifty-eight of the one hundred sixty-four plaintiffs brought their action more than three years after they were advised that they were not entitled to receive plant shutdown benefits from any plan, fund or program at any time because no such plan, fund or program existed. However, six of the plaintiffs, E.P. Fahnert, J.P. Frenn, P.J. Hannon, E.T. Jones, J.R. Kundick and G.V. Peterson, filed their action less than three years from the date that their employment with Crucible was terminated.

72. Plaintiffs all subsequently received a number of post-employment benefits from various Crucible-sponsored employee benefit plans, including: retirement, severance, and company-matched voluntary stock savings. Some of these benefits were paid as a consequence of certain amendments Crucible made to its salaried retirement and severance plans in consideration of Colt's announcement that it would sell or close Crucible's Midland division.

IDENTITY OF THE DEFENDANT

73. The Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees is the sole remaining defendant in this lawsuit.

IDENTITY OF THE CLAIM

74. The plaintiffs' sole claim is to recover benefits from the Colt Industries Operating Corporation Informal Plan for

Plant Shutdown Benefits for Salaried Employees allegedly due under its terms, pursuant to ERISA, § 502(a)(1)(B), 29 U.S.C. § I I 32(a)(1)(B).

HISTORY OF CRUCIBLE, INC.

75. In 1900, Crucible Steel Company of America incorporated under New Jersey law.

76. In 1968, after several reorganizations, reincorporations, and changes in corporate name, the former Crucible Steel Company of America changed its' name to Crucible Steel Corporation.

77. In 1968, through a series of transactions, Crucible Steel Corporation consolidated with but *de facto* became a wholly-owned subsidiary of Colt Industries, Inc., and changed its name to Crucible, Inc.

78. In August 1968, incident to these transactions, Crucible Steel Corporation and Colt Industries, Inc., entered into a series of written agreements.

79. In September 1968, by order of the Board of Directors of Crucible Steel Corporation, the Secretary of C[illegible]ble Steel Corporation sent to the registered stockhold[illegible] of Crucible Steel Corporation a 1968 Colt Industries, Inc. - Crucible, Inc., Joint Proxy Statement, with copies of the written agreements attached; at the same time, the Secretary of Colt Industries, Inc., sent the same materials to the registered shareholders of Colt Industries, Inc.

80. Anyone who owned shares in either Crucible Steel Corporation or Colt Industries, Inc., registered in their individual name as of the record date set forth in the Proxy Statement, received a copy of the 1968 Colt Industries, Inc. - Crucible Steel Corporation Joint Proxy Statement.

81. The purposes of the Joint Proxy Statement were to inform the shareholders of both Crucible Steel Corporation

and Colt Industries, Inc., of the terms of the proposed consolidation of Colt Industries, Inc., and Crucible Steel Corporation and to solicit the shareholders' proxies in compliance with the securities laws of the United States and the various states.

82. Some of the plaintiffs who were shareholders in Crucible Steel Corp received the proxy statement.

83. In October 1968, the stockholders of Crucible Steel Corporation and the stockholders of Colt Industries, Inc., separately approved these transactions by separate shareholder votes.

84. Crucible, Inc., has since changed its name to Colt Industries Operating Corporation and continues to be a wholly-owned subsidiary of Colt Industries, Inc.

85. Presently, Colt Industries Operating Corporation is a dormant corporation.

CRUCIBLE, INC.'S ESTABLISHMENT AND MAINTENANCE OF THE COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES.

PRE-EXISTING PLAN, FUND, OR PROGRAM PROVIDING PLANT SHUTDOWN BENEFITS

86. Effective July 1, 1962, Crucible Steel Company of America adopted an Early Severance and Disability Benefit Program.

87. Crucible Steel Company of America incorporated the terms and conditions o the Early Severance and Disability Benefit Program in a July 10, 1962 memorandum from W. H. Knoell regarding "Early Severance and Informal Disability Benefit" and later explained these terms and conditions in an October 19, 1962 memorandum from W.H. Knoell regarding "Early Severance and Disability Benefit Program."

88. In 1962, W.H. Knoell occupied the position of Secretary of Crucible Company of America.

89. In 1962, W.H. Knoell Memoranda were addressed to the six Vice Presidents in charge of Crucible Steel Company of America's functionally integrated departments.

90. The 1962 W.H. Knoell Memoranda were not distributed to the plaintiffs.

91. On August 22, 1962, Crucible Steel Corporation of America adopted the 1962 Early Severance and Disability Benefit Program by Board of Directors resolution.

92. Effective August 28, 1968, Crucible Steel Corporation amended and completely rewrote its Early Severance and Disability Benefit Program.

93. Crucible Steel Corporation incorporated the terms and conditions of the Early Severance and Disability Benefit Program in a 1968 document entitled "Early Severance and Disability Benefit Program," over the signature of E.C. Gendron.

94. In 1968, E.C. Gendron occupied the position of Vice President of Finance at Crucible Steel Corporation.

95. The 1968 document entitled "Early Severance and Disability B Program" was unaddressed.

96. During 1968, the 1968 document entitled "Early Severance and Disability Program" was distributed to the plaintiffs.

97. The 1968 document entitled "Early Severance and Disability Program" was summarized in a memorandum dated September 9, 1968, over the signature of B.H. Francis.

98. On September 9, 1968, B.H. Francis was Crucible, Inc.'s Corporate Director of Employee Benefits.

99. The September 9, 1968, B.H. Francis memorandum is unaddressed, but on its face, it neither limits nor extends distribution to anyone.

100. During 1968, the September 9, 1968, B.H. Francis memorandum was also distributed to the plaintiffs.

101. An "Informal Retirement Program" was referred to in a memorandum from. John C. Lobb to "Salaried - Non-Union Employees" dated September 12, 1968, regarding "Salaries and Benefits."

102. On September 12, 1968, John C. Lobb was President of Crucible Steel Corporation.

103. The September 12, 1968, John C. Lobb memorandum was addressed to "Salaried Non-Union Employees."

104. The September 12, 1968, John C. Lobb memorandum states in pertinent par "We are in the process of improving our benefits programs including provisions for long-term disability insurance and recently revised our informal retirement Program to provide greatly improved payments for those eligible salaried employees having more than 20 but less than 30 years of service." (Emphasis added).

105. During 1968, the John C. Lobb memorandum was distributed to the plaintiffs.

106. A December 18, 1968, memorandum from E.A. March entitled "Early Severance and Disability Program" stated:

> Effective at once, please make no commitments to any non-Union employees as to early retirement. This in no way forecloses the possibilities of early retirement but does mean that no commitment can be made to the individual without prior clearance.
>
> It is possible that additional clarification will be forth-coming from our New York corporate headquarters.

> The second instructions will naturally supersede these requirements.

107. In December 1968, E.A. March occupied the position of Vice President of Colt Industries, Inc., and Group Vice President of Crucible, Inc.

108. The December 18, 1968, E.A. March memorandum was addressed to Crucible, Inc.'s Corporate Vice President and the Presidents of Crucible, Inc.'s Stainless Steel and Alloy Divisions.

109. The December 18, 1968, E.A. March memorandum was not distributed to the plaintiffs.

110. On May 16, 1969, Crucible, Inc., ratified by a Board of Directors resolution the terms of the 1968 document entitled "Early Severance and Disability Benefit Program."

111. Effective February 10, 1969, Crucible, Inc., amended and completely rewrote the Early Severance and Disability Benefit Program.

112. Crucible, Inc., incorporated the terms and conditions of the Early Severance and Disability Benefit Program in a 1969 document entitled "Hardship Retirement Guidelines."

113. The 1969 document entitled "Hardship Retirement Guidelines" is unsigned.

114. The second paragraph of the 1969 document entitled "Hardship Retirement Guidelines" states:

> NOTE that employees do not have a *right* to these benefits. Information concerning these benefits should be restricted as far as possible to management. Employees should *not* be told that they can elect these benefits.

115. The third paragraph of the 1969 document entitled "Hardship Retirement Guidelines" states:

> *The present Informal Severance and Disability Plan of Crucible Steel Corporation has been terminated. except as to benefits already approved.* Proposals which have been submitted under that Plan, but have not been acted upon, may be considered under these Guidelines. (Emphasis added.)

116. The 1969 document entitled "Hardship Retirement Guidelines" is unaddressed.

117. Crucible, Inc., did not cause the terms and *conditions of* the 1969 Hardship Retirement Guidelines to be communicated to the salaried non-union employees.

118. With the possible exception of plaintiffs Whitten and Kundick, the plaintiffs did not receive a copy of the 1969 document entitled "Hardship Retirement Guidelines."

119. The 1969 document entitled "Hardship Retirement Guidelines" were the subject of and attached to a memorandum of A.C. Hilton dated March 25, 1969.

120. In 1969, A.C. Hilton occupied the position of Vice President of Administration at Colt Industries, Inc.

121. The March 25, 1969, A.C. Hilton memorandum was addressed to the Presidents and Personnel Directors of each of Crucible, Inc.'s geographically dispersed operating divisions; copies were addressed to members of Crucible, Inc.'s Retirement Board, various officers of Crucible, Inc., and various officers and management employees of Crucible, Inc.'s sole shareholder, Colt Industries, Inc.

122. The March 25, 1969, A.C. Hilton memorandum states: "Attached is the procedure which may be used in cases where the terminated employee is to be given consideration beyond the provisions of the Restated Employees Retirement Plan (the Formal Plan)."

123. The final paragraph of the March 25, 1969, A.C. Hilton memorandum states: "Distribution of these procedures should be limited to those members of management who have need to know."

124. With the possible exception of plaintiffs Whitten and Kundick, the plaintiffs did not receive any memoranda describing the contents of or referring to the document entitled "Hardship Retirement Guidelines," including the March 25, 1969, A.C. Hilton memorandum.

125. On May 16, 1989, Crucible, Inc., adopted by a Board of Directors resolution the 1969 Hardship Retirement Guidelines.

126. The May 16, 1969, Crucible, Inc. Board of Directors resolution stated, in part:

> [P]rovided that employees shall have no right to receive or continue to receive any benefits thereunder, payment of such benefits being at the discretion of Pension and Retirement Board; provided, however, that the action herein contained does not give any employee any right or remedy in respect of Hardship Retirement and the same may be rescinded at any time or withheld in any case or in all cases at the discretion of management or this Board of Directors.

127. None of the plaintiffs received a copy of the May 16, 1969, Crucible, Inc. Board of Directors resolution.

128. Crucible, Inc. never issued to its salaried non-union employees any formal written notice that the company had adopted the 1969 Hardship Retirement Guidelines.

129. The Early Severance and Disability Benefit Program was discussed in an October 22,1971 memorandum from R.W. Ahern and R.S. Barr regarding "*FRINGE BENEFIT ADMINISTRATION.*"

130. In 1971, R.W. Ahern occupied the position of Vice President, Industrial Relations—Syracuse, Crucible, Inc.; and R.S. Barr occupied the position of Vice President, Employee Relations—Midland, Crucible, Inc.

131. The October 22,1971, R.W. Ahern and R.S. Barr memorandum was addressed to Crucible, Inc.'s Group Vice President, members of Crucible, Inc.'s Retirement Board, and various management employees assigned duties in employee relations, industrial relations, and accounting at Crucible, Inc.'s geographically dispersed operating divisions.

132. The October 22, 1971, R.W. Ahern and R.S. Barr memorandum states, in part:

> A meeting was held on October 13th and 14th to discuss fringe benefit administration for those Crucible divisions which are tied to the Master Agreement with the USW representatives from Midland, Syracuse, Spaulding, Spring and Colt attending. Mr. Richard Lyon from Higginbottom, Marquette & Burroughs, our group insurance consultant also attended.
>
> The general purpose of the meeting was to review the current status of all fringe benefit programs, define the problems and establish effective coordination, communication and control. The memo attempts to outline the results of the meeting.
>
> II. REYIEW OF PLANS
>
> D. SALARIED RETIREMENT ELANS

Some additional elements of the design for the proposed salaried plans were covered.

> 3. INFORMAL PLANS
>
> With L.T.D. insurance included in the program, we see no problem in handling the disability situations now handled by the various informal plans.

The only problem area where a gap develops in the elimination of the informal plan is in the case of plant shutdown, an economic reduction, a situation of mutual incompatibility of managers. The present union plan provides for immediate normal retirement benefits in these cases provided an employee is 55 and has age and service totaling at least 70. Our proposal would be to provide for immediate normal benefit levels for an employee who is at least 55 and has at least 15 years service in cases where he is reduced for:

a. Permanent shutdown of plant.

b. An economic reduction deemed to be permanent.

c. A situation in which both management and the individual determine and consent that it would be to their mutual advantage to have the individual retire.

The cost of this benefit would not be taken against normal cost but would be charged as a loss against the annual valuation of the fund. Employment with competitors would suspend payment of the benefit until age 65.

The highlights of this discussion have been given verbally to Mr. Hayward and a meeting to finalize our proposal to Messrs. Hilton and March set for late in the week of the 25th.

133. With the possible exception of plaintiff Schake, the plaintiffs did not receive a copy of the October 22, 197 1, R.W. Ahern and R.S. Barr memorandum.

134. Effective December 1, 1972, Crucible, Inc., rescinded the Early Severance and Disability Benefit Program.

135. Crucible, Inc., rescinded the Early Severance and Disability Benefit Program by a December 1, 1972, Board of Directors resolution.

136. The December 1, 1972, Crucible, Inc., Board of Directors resolution stated, in part:

> RESOLVED, that effective as of December 1, 1972 the Hardship Retirement Guidelines and the Hardship Disability Retirement Guidelines adopted by the Board of Directors on May 16, 1969 be, and they hereby are, rescinded and of no further effect except with respect to individuals who are receiving benefits under either of such Guidelines on December 1, 1972.

137. None of the plaintiffs received a copy of the December 1, 1972, Crucible, Inc. Board of Directors resolution.

138. The Early Severance and Disability Benefit Program was mentioned in a January 26, 1973, memorandum from E.A. March regarding "Total Income Protection Plan."

139. In 1973, E.A. March occupied the position of Group Vice President of Crucible, Inc.

140. The January 26, 1973, E.A. March memorandum was addressed to the Presidents and Personnel Directors of Crucible, Inc.'s geographically dispersed operating divisions; copies were addressed to members of Crucible, Inc.'s Retirement Board and various officers and management employees of Crucible, Inc.'s sole shareholder, Colt Industries, Inc.

141. The January 26,1973, E.A. March memorandum states:

> With the adoption of the new benefits package in 1973, the following administrative procedures should be followed to

provide uniform interpretation of the various plans throughout the divisions:

1. *Retirement and LTD Plans*

   A. Persons whose retirement income is calculated under the new plan will not be entitled to any informal benefits nor will they be entitled to any supplemental benefits not specifically authorized by the new plan.

   B. Interpretation of the new plan must be obtained through John Cataldo (Midland) who will be responsible for clearing interpretations with the Corporate Committee and maintaining a file of approved interpretations.

   C. Whenever a proposed interpretation differs in any way from a prior approved interpretation, John Cataldo will submit such proposed interpretation to Dana Hayward, of the Retirement Board, simultaneously sending a copy to James Devaney, and provide all pertinent background.

   D. The official file of the plan, clarifications, interpretations and modifications will be kept by the Retirement Board but copies are to be updated and in the hands of James Devaney and John Cataldo.

2. *Crucible Fund*

   Questions concerning the Crucible Fund requiring official interpretation or determination will be directed to Dana Hayward of the Crucible Fund Committee who will respond with a copy to James Devaney.

3. *Procedure*

   To insure uniformity and to avoid improper expectations on the part of the employee, NO INTER-

PRETATION SHOULD BE PROVIDED TO ANY EMPLOYEE UNTIL THE ABOVE PROCEDURES HAVE BEEN FOLLOWED.

142. None of the plaintiffs received a copy of the January 26, 1973, E.A. March memorandum.

143. The Early Severance and Disability Benefit Program was the subject of a March 16, 1973, memorandum from E.A. March regarding "Pension Benefits."

144. In 1973, E.A. March occupied the position of Group Vice President of Crucible, Inc.

145. The March 16, 1973, E.A. March memorandum was addressed to the Presidents, Controllers, and Personnel Directors of Crucible, Inc.'s geographically dispersed operating divisions; a carbon copy was addressed to one member of Crucible, Inc.'s Retirement Board.

146. The March 16, 1973, E.A. March memorandum states:

> To repeat my previous instructions, there is no "Informal Pension Plan" to which new names can be added. *We will endeavor to provide all employees with information to this effect by incorporating a statement in the Retirement Plan booklet that there are no pension benefits not spelled out in the plan.* (Emphasis added).
>
> Employees who retired after October 1, 1971, but before December 1, 1972, will receive pension benefits from the Retirement Plan based upon the calculation under the new plan or they will continue to receive their pension under the new plan plus an amount paid by the division up to the total of their prior pension plus their prior informal payment. In no case will they receive a total from both the Pension Plan and the Informal Plan that is greater than the amount they were receiving in total prior

to December 1, 1972. Obviously no adjustments will be made to payments made prior to the effective date of the plan.

147. Had this endeavor been implemented, the parties would not be before the Court today. *See Henglein I*, 974 F.2d 391, 400 (3d Cir. 1992). ("A summary plan document that clearly limits benefits to those provided in a formal plan would be dispositive.") The defendant has failed to adequately explain why such information was not communicated to employees.

148. With the possible exception of plaintiff Schake, the plaintiffs did not receive a copy of the March 16, 1973, E.A. March memorandum.

149. With the possible exception of plaintiffs Schake, Whitten and Kundick, the plaintiffs did not receive any memoranda stating that Crucible had rescinded the Early Severance and Disability Benefit Program.

150. Crucible, Inc., never issued to its salaried non-union employees any written notice that the company had rescinded the Early Severance and Disability Benefit Program.

151. March instructed Barr when he advised him that the informal plans were no longer in effect, "I don't want anyone to talk about it."

152. It was standard practice at Crucible to issue written notice to employees of changes in benefit plans.

PROPERLY PUBLISHED WRITTEN REPRESENTATIONS PERTAINING TO PLANT SHUTDOWN BENEFITS

153. In 1947, Crucible, Inc., adopted a retirement plan for salaried non-union employees, incorporated its terms in writings, and periodically rewrote and amended it.

154. Crucible, Inc., amended and rewrote its retirement plan for salaried non-union employees effective December 1, 1972, and incorporated its terms and conditions in a 1972 document entitled "Crucible Inc. Retirement Plan for Eligible Salaried Employees."

155. The terms and conditions of the Crucible, Inc., Retirement Plan for Eligible Salaried Employees were summarized in a 1973 document entitled "Retirement Plan for Eligible Salaried Employees of Crucible Inc. Summary Plan Description."

156. The 1973 document entitled "Retirement Plan for Eligible Salaried Employees of Crucible Inc." contains no statement asserting that salaried non-union employees do not have pension benefits beyond those set forth in the Crucible, Inc., Retirement Plan for Eligible Salaried Employees; nor does it expressly state that salaried non-union employees would receive no specific additional benefit in the event of a plant shutdown beyond those specifically described therein.

157. The 1972 document entitled "The Summary Plan Description of Retirement Plan for Eligible Salaried Employees of Crucible Inc." was printed in booklet form and distributed to all of Crucible, Inc.'s salaried non-union employees, in compliance with existing law.

158. Crucible, Inc., amended and rewrote the Retirement Plan for Eligible Salaried Employees of Crucible, Inc., effective January 1, 1976, and incorporated its terms and conditions in a 1976 document entitled "The 1975 Salaried Retirement Plan for Eligible Employees of Crucible, Inc."

159. The terms and conditions of the 1975 Salaried Retirement Plan for Eligible Employees of Crucible, Inc., were summarized and set forth completely in a 1976 document entitled "1975 Salaried Retirement Plan for Eligible Employees of Crucible, Inc. Summary Plan Description."

160. The 1976 document entitled "1975 Salaried Retirement Plan for Eligible Employees of Crucible, Inc." contains no statement asserting that salaried non-union employees do not have pension benefits beyond those set forth in the 1975 Salaried Retirement Plan for Eligible Employees of Crucible, Inc.; nor does it expressly state that salaried non-union employees would receive no benefit in the event of a plant shutdown.

161. Prior to their termination, no information was ever communicated to the salaried employees of Crucible, Inc., including the plaintiffs, that they would receive no benefit in the event of a plant shutdown.

162. The 1976 document entitled "1975 Salaried Retirement Plan for Eligible Employees of Crucible, Inc. Summary Plan Description" was printed in booklet form and distributed to all of the salaried non-union employees of Crucible, Inc., working at locations to which its terms applied, including Crucible, Inc.'s Stainless Steel and Alloy Divisions in Midland, Pennsylvania, in compliance with existing law.

163. Three Crucible Vice Presidents, Schake, Bressinelli and Trbovich, who also served as members of the Crucible Executive Committee were never informed about the cancellation of plant shutdown benefits for salaried employees. Moreover, Pendick, who reported directly to Barr, was also unaware of the rescission of any informal plans prior to 1982.

164. Significantly, John Vensel, President of Crucible, Inc.'s Alloy Division at the Midland plant testified that plant shutdown benefits for salaried non-union employees existed in 1982. Testimony of Vensel, p. 31-32 (Document No. 275—pp. 31-32).

165. Moreover, Vensel admitted he communicated that understanding to salaried employees he supervised. (Document No. 275—p. 36).

CRUCIBLE'S PRACTICE OF STRUCTURING SALARIED NON-UNION EMPLOYEE BENEFIT PROGRAMS TO PROVIDE THE SAME SPECIFIC BENEFITS PROVIDED TO OTHER CLASSES OF EMPLOYEES

166. Dating back to the time each of the plaintiffs commenced their employment as salaried non-union employees of Crucible, Inc., Crucible, Inc., intended to and routinely structured salaried non-union employee benefit programs to provide benefits that were identical to or corresponding in value to benefits union employees received pursuant to collective bargaining agreements; and that were competitive with benefits provided to salaried non-union employees of other steel producers and manufacturers.

167. Crucible, Inc., adopted a written policy for structuring salaried non-union employee benefit programs to provide benefits that were identical to or corresponding in value to benefits union employees received pursuant to collective bargaining agreements; and that were competitive with benefits provided to salaried non-union employees of other steel producers and manufacturers.

168. The September 12, 1968 John C. Lobb memorandum regarding "Salaries and Benefits" states:

> Contrary to recent statements that you may have heard, Crucible salaries are not frozen. Merit increases are and will still be given where they are deserved. Our Merit Increase Policy has been expanded to permit up to 15% above the individual's current salary. We are also revising our rate ranges.
>
> Certain companies have recently given across-the-board increases to their excluded personnel ranging from 7 to 8% of salaries. Such a give-away program does little to stimulate performance, enhance our competitive position, or increase the return to shareholders. A Union contract, negotiated by Crucible's competitors, cannot be

any basis for determining salary policies for excluded personnel from the President on down.

Crucible will not depart from its existing position of better pay for better performance. We have had a continuing and more liberal merit program than many of the other steel companies. As far as we know, the Crucible Fund is better than offered by others in the Industry. *This will continue in the future.*

A salary program is designed to accomplish certain important things, including economic equity and to provide opportunities to reward accomplishment. General increases are an indication of management inability to determine those who contribute most to Division and Corporate progress. Instead, all who are on the payroll, regardless of attitude, output or achievement are given equal recognition.

The Union worker has, on an average, experienced a *24 1/2% increase since 1961.* Most of you have fared considerably better under a merit approach and through greater opportunities for promotion. Your supervisor will, in the weeks ahead, review with you your individual progress.

We have recently completed a comprehensive survey of leading companies both inside and out of our industries. All salary ranges are being restructured to provide for earnings equal or better to competition. We are in the process of improving our benefits programs *including provision for long-term disability insurance and recently have revised our informal retirement program to provide greatly improved payments for those eligible salaried employees having more than 20 but less than 30 years of service.* You will be kept advised of benefits improvements as they are approved during the balance of the year.

> I believe Crucible employees have a sense of pride. That means that most of our excluded employees are interested in individual recognition; and, a salary policy that distinguishes between outstanding and just marginal achievement. (Emphasis added.)

169. A May 5, 1970, interoffice memorandum from Dana W. Hayward regarding Informal Pension Benefits states:

> Attached is copy of a memorandum concerning certain informal pension benefits, the context of which should be self-explanatory. Please let me know if there are any questions.

170. In 1970, Dana W. Hayward occupied the position of a member of Crucible, Inc.'s Retirement Board.

171. The May 5, 1970, Dana W. Hayward memorandum was addressed to Crucible, Inc.'s Group Vice President and the Presidents and Personnel Directors of Crucible, Inc.'s Stainless Steel and Alloy Divisions; copies were addressed to other members of Crucible, Inc.'s Retirement Board and the Vice President of Administration at Crucible, Inc.'s sole shareholder, Colt Industries, Inc.

172. The attached memorandum dated April 30, 1970, and entitled "*INFORMAL PENSION BENEFITS*" states:

> *This memorandum is for limited distribution (it may be shown only to recipients listed below), and its context is not to be discussed with employees inquiring as to pension benefits.* These are informational guidelines relating to some individual cases of salaried employees applying for or inquiring about retirement benefits. (Emphasis added.)
>
> Apart from the Hardship Retirement Guidelines, the purpose of which is to provide informal benefits for certain hardship cases, it is recognized that salaried employees of certain age and service may receive a

benefit less than the benefit which would be determined if the union formula had been extended to the Restated Plan (salaried). The union formula provides the greater of a benefit of 1% of final pay times years of credited service, or $6.50 times years of service not limited to 35 years. The Restated Plan, as now amended, provides no change in the salary formula but does provide a minimum of $6.50 times years of service not limited to 35 years.

When circumstances dictate, consideration may be given to measuring the salaried benefit against the I% formula. Each case shall be individually reviewed. The employee shall be given no assurance that this policy will be implemented. If the circumstances are such that consideration should be given the request for such an informal benefit, it must have the approval of the Division President and Mr. March, and then submitted to the corporate office, attention of D.W. Hayward, for review and consideration by the Pension Committee which acts upon hardship retirement guideline applications.

Only after *all* approvals have been obtained, may the employee be told of this specific treatment of his case.

All employees who receive a benefit under this provision will receive (1) a retirement income paid in the usual manner under the Restated Employees Retirement Plan, plus (2) the additional amount payable to increase the total income to the amount provided by the 1% formula. This additional amount will be paid as part of local plant payroll in the same manner as is done under existing informal plans.

This memorandum may be superseded at any time and it is therefore extremely important that it is not used for the consideration of any retirement applications which are more than one year in the future.

173. None of the plaintiffs received the May 5, 1970, Dana W. Hayward memorandum and the attached April 30, 1970, memorandum.

174. The August 1, 1976, Colt Industries, Inc., Policies and Procedures Number 74.1 document regarding "EMPLOYEE BENEFITS (INSURANCE AND PENSIONS)" states:

> *POLICY*:
>
> Colt Industries will maintain a good level of employee benefits consistent with general industry-wide practices, Company means, and sound business judgment.
>
> To the extent feasible, benefits for salaried non-bargaining unit employees will be provided under uniform plans.
>
> All benefit plan costs should, wherever possible, be under the control of management. Plans should not be designed so that costs change automatically because of external economic pressures or developments.
>
> *PURPOSE*:
>
> Colt Industries has the intention, within its means, of providing benefit plans which will assist employees in times of need as well as on retirement and which will encourage personal thrift and investment.
>
> *RESPONSIBILITY*:
>
> The Vice President'-Personnel is responsible for the development and maintenance of employee benefit plans in accordance with Company policy. The Corporate Employee Benefits Department is responsible for overall administration of benefit plans. Company locations are responsible for local administration of plans subject to Corporate review. New benefits are not to be introduced without Corporate approval.

PROCEDURE:

A. Not only should all Company locations be continually aware of employee needs, but should also continually audit costs of benefit plans and attempt at all times to avoid uncontrollable costs. The following are guidelines which, if followed, will assist in providing controlled costs:

1. Avoid provisions which escalate costs due to external sources, e.g., benefits tied to price or cost index, reasonable and customary doctors' fees or semi.-private hospital room rates, rather than scheduled amounts. On the other hand, the Company is willing to provide reasonable reimbursement of costs, so fee schedules in plans should be kept current.
2. Avoid automatically applying benefit provisions designed for one group of employees to another inappropriate group. The effect could be totally disproportionate to the needs or the overall purpose.
3. Avoid applying benefits that are designed for active employees to retired personnel.
4. Avoid payments to non-working employees or pensioners that are too great a percentage of active employment renumeration.
5. Avoid new benefits for which cost information is insufficient.
6. Include "Coordination of Benefits" provisions in plans.

B. Questions from employees, pensioners, beneficiaries or others relating to effects of tax laws on benefits are not to be answered unless a legal review of the response has been made. Such questions should be answered by the person's own counsel.

175. The August 1, 1976, Colt Industries, Inc. Policies and Procedures Number 74.1 regarding "EMPLOYEE BENEFITS (INSURANCE AND PENSIONS)" was one of a number of Policies and Procedures included in a volume entitled "Colt Industries Policies and Procedures."

176. The volume entitled "Colt Industries, Inc. Policies and Procedures" was distributed to senior management employees at Crucible, Inc.

177. A copy of the August 1, 1976, Colt Industries, Inc. Policies and Procedures Number 74.1 regarding "EMPLOYEE BENEFITS (INSURANCE AND PENSIONS)" was distributed to the plaintiffs in 1976.

178. Both medium and large-sized steel producers and manufacturers followed a practice of providing salaried non-union employees benefits, to include pension supplements in the event of a plant shutdown, similar to or equal in value to benefits provided to union employees.

179. Crucible, Inc., followed a practice of structuring salaried non-union employee benefit programs to provide benefits that were competitive with benefits provided to salaried non-union employees of other steel producers and manufacturers.

180. Crucible, Inc., followed a practice of structuring salaried non-union employee benefit programs to provide benefits at least equal in value to benefits provided to union employees.

INTERNAL OR DISTRIBUTED DOCUMENTS RELATING TO THE SPECIFIC PLANT SHUTDOWN BENEFITS SOUGHT

181. The internal and distributed documents issued by Crucible, Inc., relate specific plant shutdown benefits sought in this lawsuit.

182. A 1972 document entitled "TOTAL INCOME PROTECTION PLAN FOR ELIGIBLE CRUCIBLE SALARIED EMPLOYEES" was distributed to the salaried non-union employees who attended a series of meetings during 1973.

183. The 1972 document entitled "TOTAL INCOME PROTECTION PLAN FOR ELIGIBLE CRUCIBLE SALARIED EMPLOYEES" was an informational brochure informally summarizing salaried non-union employee benefits.

184. The 1972 document entitled "TOTAL INCOME PROTECTION PLAN FOR ELIGIBLE CRUCIBLE SALARIED EMPLOYEES" states:

> Total Income Protection is the term we use to describe the many benefits you receive as an employee of Colt Industries. These benefits include your Comprehensible Medical Expense Program, your Life Insurance Plan, the Retirement program, the Crucible Fund, and the Salary Continuance plan. In other words, all the benefits that protect your income in case of sudden emergencies—such as illness, disability or death—as well as those benefits which provide you an income after you retire. They are, literally, protection of your income, since they are designed to protect you against sudden financial outlay in the many events that may happen during your life as an employee.

ORAL REPRESENTATIONS BY KNOWLEDGEABLE AND AUTHORIZED MANAGEMENT EMPLOYEES RELATING TO THE SPECIFIC PLANT SHUTDOWN BENEFITS SOUGHT

185. Dating back to the time each of the plaintiffs commenced his/her employment as salaried non-union employees of Crucible, Inc., knowledgeable and authorized management employees of Crucible, Inc., made oral

representations concerning the structure of salaried non-union employee benefit programs.

186. Superintendents and Assistant Superintendents at Crucible, Inc., often recruited from the union ranks personnel to fill salaried non-union positions.

187. Whenever a Superintendent or Assistant Superintendent at Crucible, Inc. recruited a union employee to fill a salaried non-union position, he or she would urge the union employee to accept the promotion.

188. Whenever a Superintendent or Assistant Superintendent at Crucible, Inc. recruited a union employee to fill a salaried non-union position, he or she would assure the union employee that benefits for salaried non-union employees would always equal or exceed in value benefits extended to union employees.

189. At no time did any Superintendent or Assistant Superintendent at Crucible, Inc. refer to any specific union benefit plan or any provision of a union benefit plan.

190. Superintendents and Assistant Superintendents at Crucible, Inc. believed in good faith that benefits for salaried non-union employees would always equal or exceed in value benefits extended to union employees.

191. Superintendents and Assistant Superintendents at Crucible, Inc. were generally aware of the contents of Pension Agreements negotiated between Crucible, Inc. and the United Steelworkers of America.

192. Superintendents and Assistant Superintendents at Crucible, Inc. had no knowledge that Crucible, Inc. had rescinded the 1968 Early Severance and Disability Benefit program and the 1969 Hardship Retirement Guidelines.

193. During the period 1969 through 1982, officers of Crucible, Inc. made oral representations at meetings of the Crucible, Inc. salaried non-union employees dealing with the subject of employee benefits.

194. Crucible, Inc. held annual dinner meetings for the salaried non-union employees at the Crucible Management Club.

195. Crucible, Inc. frequently held breakfast meetings for the salaried non employees at the Midland plant restaurant.

196. E.A. March, J. Vensel, M. Ornitz, C. Kurcina, R. Barr, and others spoke at these meetings.

197. M. Ornitz occupied the position of President of Crucible, Inc.'s Alloy Division.

198. C. Kurcina occupied the position of Senior Vice President of Manufacturing Services for Crucible, Inc.'s Stainless Steel and Alloy Divisions.

199. R. Barr occupied the position of Vice President of Personnel for Crucible, Inc.'s Stainless Steel and Alloy Divisions.

200. At various times during these meetings, E.A. March, J. Vensel, M. Ornitz, C. Kurcina, and others expressly told the salaried non-union employees attending these meetings that the benefits extended to salaried non-union employees of Crucible, Inc., would always equal or exceed in value the benefits extended to union employees of Crucible, Inc.

201. At no time and at none of these meetings did any individual refer specifically to any union benefit plan or any provision of a union benefit plan.

202. E.A. March, J. Vensel, M. Ornitz, and C. Kurcina knew at the time of these meetings what benefit plans, funds, and programs were in existence and covered salaried non-union employees.

203. In January 1982, J. Vensel made oral representations at a meeting of approximately 60 to 100 Crucible, Inc., salaried non-union employees dealing with the sale or shutdown of Crucible, Inc.'s specialty steel and alloy

production and manufacturing facilities in Midland, Pennsylvania.

204. J. Vensel expressed hope that the facilities would be sold to Cyclops and operated as a mini mill.

205. J. Vensel stated that the employees should remain at work so that C could start-up mini mill operations without delay.

206. J. Vensel said, "Do not fly the coop."

207. J. Vensel stated that if worse came to worse and a shutdown occurred, the salaried non-union employees of Crucible, Inc., would get whatever plant shutdown benefits that the union employees received and more.

208. Plaintiffs Richard D. Feydo, Daniel D. McClain, John A. Nuzzo, Ralph T. Turner, and others were present at this meeting.

209. J. Vensel knew at the time of this meeting what benefit plans, funds, and programs were in existence and covered salaried non-union employees.

210. Crucible, Inc. supervisors, superintendents, and officers passed on to other Crucible, Inc. salaried non-union employees the oral representations dealing with the subject of employee benefits which the officers of Crucible, Inc. made at meetings of the Crucible, Inc. salaried non-union employees during the period 1969 through 1982.

THE EMPLOYEES' REASONABLE EXPECTATIONS CONCERNING THE SPECIFIC PLANT SHUTDOWN BENEFITS SOUGHT

211. The plaintiffs reasonably expected in 1982 to receive plant shutdown benefits.

212. The contents of the 1968 Colt Industries, Inc. - Crucible Steel Corporation Joint Proxy Statements caused the

plaintiffs who received the proxy statement or who otherwise learned of it to believe that Crucible, Inc., would never terminate any of its employee benefit programs, to include the existing Early Severance and Disability Benefit Program, following its consolidation with Colt Industries, Inc.

213. The written and oral representations pertaining to the general structure of salaried non-union employee benefit programs and plant shutdown benefits which plaintiffs received caused the plaintiffs to believe that Crucible, Inc., had established and maintained a program that would provide them with additional pension benefits in the event of a plant shutdown.

214. Over the course of their employment as Crucible, Inc., salaried non-union employees, the plaintiffs had some background knowledge of the contents of the pension agreements between Crucible, Inc., and the United Steelworkers of America.

215. The plaintiffs were aware that over the course of their employment as Crucible, Inc., salaried non-union employees they received benefits corresponding in kind or value to benefits that union employees received pursuant to collective bargaining agreements.

CRUCIBLE'S DELIBERATE FAILURE TO CORRECT THE EMPLOYEES' KNOWN PERCEPTIONS OF THE PLAN'S EXISTENCE

216. Beginning in 1968, the plaintiffs believed that in the event of a plant shutdown there existed a program which would provide salaried non-union employees with additional pension benefits.

217. Other salaried non-union employees put Crucible, Inc. on notice that the plaintiffs believed that there existed a program which would provide salaried non-union employees with additional benefits in the event of a plant shutdown.

218. In 1973, Crucible, Inc. closed its operations in Spaulding, New Jersey.

219. The employment of Eugene McCarthy and Frank Calton, salaried non-union employees at Crucible, Inc.'s Spaulding, New Jersey operations, was terminated as a result of this closing.

220. A July 15, 1973 letter from Eugene McCarthy to Charles Kurcina states, in part:

> On April 30, 1973, after 26 years of service at Colt-Crucible, I was laid off due to the plant being phased out.
>
> In a letter from Mr. Lobb, President, dated September 12, 1968 and in a pension plan dated August 28, 1968 and signed by Mr. E.C. Gendron, Vice President-Finance, it was stated that non-union employees would be eligible for early retirement in the event the operations of the plant were discontinued. This being the case, I would like my name submitted to the Retirement Board, in order that I may begin receiving early retirement payments immediately. Any and all help from you in processing this application would be greatly appreciated.
>
> Hoping to hear from the Board in the near future . . .

221. In 1973 Charles Kurcina occupied the position of Vice President of Crucible, Inc.'s operations in Spaulding, New Jersey.

222. A July 31, 1973, letter from John Cataldo, Manager, Employment & Employee Benefits, Crucible, Inc. addressed to "Mr. Frank Calton, 171 Fields Avenue, Hasbrouck Heights, NJ" states, in part:

> At the time of your termination of employment, you requested that you be considered for retirement benefits under the old informal severance and disability plan. All

such informal plans were terminated on December 1, 1972, when the new retirement plan for salaried employees was put into effect.

223. An August 1, 1973, letter from John Cataldo addressed to Edward J. McCarthy states, in part:

> At the time of your termination of employment, you requested that you be considered for retirement benefits under the old informal severance and disability plan. All such informal plans were terminated on December 1, 1972, when the new retirement plan for salaried employees was put into effect.

224. An unsigned October 26, 1973, letter from D. Hayward addressed to Frank Calton states:

> The Informal Pension Program described in Mr. E. Gendron's and Mr. Lobb's letters which were written in 1968 discontinued during March of 1969. Accordingly, your request for an Informal Pension under that program cannot be granted. Gateway Four employees who were terminated while the Informal Pension Program was in effect did receive benefits under that program. I have reviewed your benefit under the present Retirement - Plan which was put into effect on 12-1-72, and it is as set forth in Mr. Cataldo's letter to you of July 31, 1973. I am sure that you are aware that the pension benefits under this plan are substantially improved over the prior Retirement Plans.

225. In 1973, D. Hayward occupied the position of a member of Crucible, Inc.'s Retirement Board.

226. Crucible, Inc., deliberately failed to correct the plaintiffs' known perceptions that there existed a program which would provide salaried non-union employees with additional benefits in the event of a plant shutdown.

CRUCIBLE'S INTENTIONS CONCERNING THE SPECIFIC BENEFITS SOUGHT

227. From 1962 to 1972, Crucible, Inc., intended to establish and maintain a program to provide salaried non-union employees with specific benefits in the event of a plant shutdown.

FEATURES OF THE COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES

228. The Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees was an existing defined benefit employee pension plan in 1982.

INTENDED BENEFICIARIES OF THE COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES

229. The Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees as herein determined to be legally constituted in 1982 had and continues to have intended beneficiaries as set forth under the heading "*EARLY SEVERANCE BENEFIT*" and under the heading "*20-30 YEAR RETIREMENT*" in the 1968 document entitled "Early Severance and Disability Benefit Program," as amended, regardless of any provisions describing a selection and approval process.

INTENDED BENEFITS FROM THE COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES

230. The Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees as herein determined to be legally constituted in 1982 provided

and continues to provide benefits as set forth under the heading "*EARLY SEVERANCE BENEFIT*" and under the heading "*20-30 YEAR EETIREMENT*" in the 1968 document entitled "Early Severance and Disability Program," as amended, regardless of any provisions describing a selection and approval process.

SOURCE OF FINANCING FOR THE COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES

231. The Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees was in 1982 and continues to be unfunded; the source of financing is as set forth under the heading "*EARLY SEVERANCE BENEFIT*" and under the heading "*20-30 YEAR RETIREMENT*" in 1968 document entitled "Early Severance and Disability Benefit Program," as amended.

PROCEDURES FOR RECEIVING BENEFITS FROM THE COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES

232. The Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees as it was legally constituted in 1982 provided and presently provides a claims procedure as set forth under the headings "*ADMINISTRATION OF THE PLAN*" and "*PROCEDURE*" in the 1968 document entitled "Early Severance and Disability Benefit Program," as amended.

TERMS AND CONDITIONS OF THE DEFENDANT COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES

233. The 1968 document entitled "Early Severance and Disability Program," as adopted by Crucible, Inc., effective August 28, 1968, and later amended, provides the terms and conditions of the Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees.

CRUCIBLE, INC.'S ADOPTION OF THE EARLY SEVERANCE AND DISABILITY BENEFIT PROGRAM

234. Crucible Steel Company of America adopted an Early Severance and Disability Benefit Program and maintained the Program in 1982 when the plant shutdown occurred.

INCORPORATION BY REFERENCE OF CERTAIN OF THE ADMINISTRATION TERMS IN THE 1957 RESTATED EMPLOYEES RETIREMENT PLAN OF CRUCIBLE STEEL COMPANY OF AMERICA

235. The language under the heading "*ADMINISTRATION OF THE PLAN*" in the 1968 document entitled "Early Severance and Disability Benefit Program" incorporates by reference the provisions found in the last paragraph of "*SECTION 8-ADMINISTRATION OF THE PLAN*" in the 1957 document entitled "Restated Employees' Retirement Plan of Crucible Steel Company of America."

236. Both the language under the heading "*ADMINISTRATION OF THE PLAN*" in the 1968 document entitled "Early Severance and Disability Benefit Program" and the language found in the last paragraph of "*SECTION 8—ADMINISTRATION OF THE PLAN*" in the 1957 document entitled "Restated Employees' Retirement Plan of Crucible

Steel Company of America" refer to an entity called the "Retirement Board."

237. The language under the heading "*ADMINISTRATION OF THE PLAN*" in the 1968 document entitled "Early Severance and Disability Benefit Program" fails to provide any standard for the "Retirement Board" to use in administering the terms of the "Program."

238. However, the language found in the last paragraph of "*SECTION 8—ADMINISTRATION OF THE PLAN*" in the 1957 document entitled "Restated Employees' Retirement Plan of Crucible Steel Company of America" provides a standard for the "Retirement Board" to use in administering the terms of the "Plan."

CRUCIBLE, INC.'S AMENDMENT OF THE BENEFIT FORMULAS OF THE 1968 EARLY SEVERANCE AND DISABILITY BENEFIT PROGRAM BY WRITTEN AMENDMENT OF THE BENEFIT FORMULAS IN THE 1957 RESTATED EMPLOYEES RETIREMENT PLAN OF CRUCIBLE STEEL COMPANY OF AMERICA

239. Between 1957 and 1982, Crucible, Inc., periodically amended the formula for calculating benefits that had appeared under the heading "*SECTION 3 - BENEFITS*" in the 1957 document entitled "Restated Employees' Retirement Plan of Crucible Steel Company of America" up to and through when the company adopted the 1975 Salaried Retirement Plan for Eligible Employees of Crucible, Inc.

240. Crucible, Inc., never formally amended the formula for calculating benefits under the heading "Employees Eligible to Vested Benefits But Not Early-Retirement" in the 1968 document entitled "Early Severance and Disability Benefit Program."

241. Crucible, Inc., did not amend the formula for calculating benefits under the heading "Employee Eligible to

Vested Benefits but Not Early Retirement" in the 1968 document entitled "Early Severance and Disability Benefit Program" when the company adopted the 1975 Salaried Retirement Plan for Eligible Employees of Crucible, Inc.

242. As previously found, the 1968 document entitled "Early Severance and Disability Benefit Program" was distributed to the plaintiffs in 1968.

243. After 1968, no written information concerning the 1968 document entitled "Early Severance and Disability Benefit Program" was distributed to the plaintiffs.

CRUCIBLE, INC.'S PARTIAL AMENDMENT OF THE 1968 EARLY SEVERANCE AND DISABILITY BENEFIT PROGRAM WITH THE ADDITIONAL BENEFIT TERMS IN THE 1969 HARDSHIP RETIREMENT GUIDELINES BY ADOPTION OF THE 1969 HARDSHIP RETIREMENT GUIDELINES

244. Crucible, Inc., amended the benefits described under the heading "*EARLY SEVERANCE BENEFIT*" in the 1968 document entitled "Early Severance and Disability Benefit Program" when the company adopted the 1969 Hardship Retirement Guidelines to the extent that the terms and conditions described therein under the heading "*AMOUNT OF BENEFIT*" and "*APPFNDIX I*" increase benefits or reduce eligibility, as determined by each individual participant.

CRUCIBLE, INC. NEVER SUPPLEMENTED THE 1968 EARLY SEVERANCE AND DISABILITY BENEFIT PROGRAM WITH CERTAIN OF THE BENEFIT TERMS IN THE 1980 PENSION AGREEMENT EFFECTIVE JULY 31, 1980 FOR EMPLOYEES OF COLT INDUSTRIES CRUCIBLE, INC., ESTABLISHED PURSUANT TO AGREEMENT WITH THE UNITED STEELWORKERS OF AMERICA BY ORAL REPRESENTATIONS

245. There are no written documents that incorporate the terms and conditions of the 1980 document entitled "Pension Agreement effective July 31, 1980 for Employees of Colt Industries Crucible, Inc., Established Pursuant to Agreement with the United Steelworkers of America" into the 1968 document entitled "Early Severance and Disability Benefit Program" or any other written employee benefit plan, fund, or program applicable to the salaried non-union employees.

246. Even though knowledgeable management employees of Crucible, Inc., made oral representations concerning the structure of salaried benefits, Crucible, Inc., never supplemented, formally or informally, the monthly payment described under the headings "*EARLY SEVERANCE BENEFIT*" and "*20-30 YEAR RETIREMENT*" in the 1968 document entitled "Early Severance and Disability Benefit Program" with the $400 monthly payment set forth in the 1980 document entitled "Pension Agreement Effective July 31, 1980 for Employees of Colt Industries Crucible, Inc., Established Pursuant to Agreement With United Steelworkers of America."

THE PLAINTIFFS' INDIVIDUAL ELIGIBILITY FOR BENEFITS FROM THE COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES

247. At the time the plaintiffs' employment with Crucible, Inc., was terminated they were all participants of the Colt

Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees.

248. In 1982, any salaried non-union employee of Crucible, Inc., who had reached the age and years of service requirements according to the terms and conditions under the heading "*EARLY SEVERANCE BENEFIT*" or under the heading "*20-30 YEAR RETIREMENT*" in 1968 document entitled "Early Severance and Disability Benefit Program," as amended, and who was terminated as a consequence of a plant shutdown, was a participant of the Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees.

249. In 1982, the plaintiffs all satisfied the age and years of service requirements to receive a benefit under the terms of the 1968 document entitled "Early Severance and Disability Benefit Program," as amended.

250. On March 10, 1982, Colt Industries, Inc., Crucible, Inc.'s sole shareholder, publicly announced that it would sell or close Crucible, Inc.'s specialty steel and alloy production and manufacturing facilities located in Midland, Pennsylvania.

251. As a consequence of this decision, all employment positions related to Crucible, Inc.'s operation of its specialty steel and alloy production and manufacturing facilities located in Midland, Pennsylvania and certain of the support facilities located in Robinson Township, Pennsylvania were eliminated or relocated to other Crucible, Inc., plants or offices.

252. Crucible, Inc., involuntarily terminated the employment of all of the plaintiffs as a consequence of the elimination of certain employment positions related to Crucible, Inc.'s operation of its specialty steel and alloy production and manufacturing facilities located in Midland, Pennsylvania, and certain of the support facilities located in Robinson Township, Pennsylvania.

253. The Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees did not waive the application of the selection and approval process described under the headings "*ADMINISTRATION OF THE PLAN*" and "*PROCEDURE*" in the 1968 document entitled "Early Severance and Disability Benefit Program," as amended.

254. Crucible, Inc., never issued any instructions or guidelines that would limit either management employees or the Retirement Board's discretion as to which terminated salaried non-union employees, who have the required age and years of service, could be recommended or approved to receive plant shutdown benefits under the terms of the 1968 document entitled "Early Severance and Disability Benefit Program," as amended.

255. No supervisor or other person of authority as to other salaried non-union employees was given the authority or opportunity in 1982 to make recommendations or issue approvals for plant shutdown benefits under the terms of the 1968 document entitled "Early Severance and Disability Benefit Program," as amended.

256. Crucible Steel Corporation administered the Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees from the time of its creation until October 17, 1968.

257. Colt Industries, Inc., administered the Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees from October 17, 1968, until December 1, 1972.

258. No one officially administered the Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees after 1972.

Conclusions of Law

SUBJECT MATTER JURISDICTION

1. Section 502(a)(1)(B) of ERISA authorizes a participant to bring a civil action to recover benefits due him under the terms of the plan. 29 U.S.C. § 1132(a)(1)(13).

2. Section 502(e) grants district courts of the United States jurisdiction of actions under Sections 502(a)(1)(B), 29 U.S.C. § 1132(e).

3. The existence of an employee benefit plan is integral to the merits of a claim under Section 502(a)(1)(B) but not to the jurisdiction of the court. *Henglein v. Informal Plan for Plant Shutdown Benefits* (*Henglein I*), 974 F.2d 391, 397-98 (3d Cir. 1992).

4. Once federal law is invoked, the legal sufficiency of the facts *alleged* concerning the existence of an employee benefit plan is a question on the merits. *Id.*

5. In a claim to recover benefits from a plan under the terms of the plan through Section 502(a)(1)(B) of ERISA, the existence of an ERISA-governed plan is an element of a claim for benefits. *Id.*

CHOICE OF LAW

6. When a plaintiff alleges the existence of and claims benefits from an employee benefit plan to which ERISA applies and in proving the existence of this plan the plaintiff relies upon an employer's representations and other evidence of the employer's conduct which straddle the effective date of ERISA, a court must apply ERISA to such representations and other evidence of the employer's conduct, regardless of when these representations and this conduct occurred. *See Henglein*, 974 F.2d at 398-99 (Because the employees "have alleged the existence of and proceeded against an ERISA plan . . . [s]tate contract law is therefore not dispositive of the

employees' claim . . . . That claim must be resolved not under state law, but under ERISA, which refers to the surrounding circumstances to determine if a plan existed at the time benefits were denied . . . . [citation omitted] Those surrounding circumstances include the company's history of representations—a history that straddles the enactment of ERISA."); *see also Henglein v. Colt Indus. Operating Corp. Informal Plan for Plant Shutdown Benefits* (*Henglein II*), No. 93-3219, slip. op. at 5 (3d Cir. Jan. 13, 1994) ("We explained that pre-ERISA evidence was relevant to prove whether the plan existed in 1982, and such evidence must be evaluated under ERISA standards."); *Henglein v. Colt Indus. Operating Corp. Informal Plan for Plant Shutdown Benefits* (*Henglein III*), No. 94-3074, slip. op. at 6 (3d Cir. Sept. 26, 1994) (In *Henglein I* "we held that the district court's focus on state contract law was incorrect, and noted that the court should instead have focused on the relevant facts as determined by the Dillingham reasonable person standard."). *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982).

7. *Dillingham* does not require the creation of a separate fund or account to pay or secure the payment of any benefits. Instead, *Dillingham* only requires that there be a "source of financing."

AN EMPLOYER'S ESTABLISHMENT AND MAINTENANCE OF AN ERISA GOVERNED EMPLOYEE PENSION BENEFIT PLAN

8. An "employee pension benefit plan" is any plan, fund, or program which was heretofore or is hereafter established or maintained which results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the form of payment. ERISA § 3(2)(B), 29 U.S.C. § 1002(2)(B).

9. "In determining whether a plan, fund, or program (pursuant to a writing or not) is a reality, a court must

determine whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits." *Dillingham*, 688 F.2d at 1373.

10. ERISA does not require a beneficiary to have any actual knowledge of a written plans terms to prove the existence of an employee benefit plan. *See Henglein I*, 974 F.2d at 401 ("ERISA does not require that a beneficiary have any knowledge of a written plan's terms"); *Henglein II*, slip op. at 8 ("The publication of a plan document is strong evidence of its existence even, if decades later, employees are unfamiliar with the plan").

11. "The discretionary nature of benefits ... does not alone deprive a document or program of its status as an employee benefit plan under the *Dillingham* standard, so long as a reasonable person can ascertain the contingent benefit and contingent beneficiaries." *Henglein I*, 974 F.2d at 401.

12. In determining whether an informal plan exists, a court should first determine whether written representations about employee benefits in general were made by a putative sponsor to its employees any time over the course of their employment. *Henglein I*, 974 F.2d at 400.

13. Where there had been a pre-existing published plan, fund or program, the employer's deliberate failure to inform the employees of the plan's putative repeal would indicate that the company maintained the plan. *Id.*

14. A properly distributed summary plan description containing a clear statement that employees do not have any pension benefits beyond those provided for by a formal pension plan would be dispositive. *Id.*

15. A properly distributed summary plan description that clearly limited benefits to those found in a formal plan would be dispositive. *Id.*

16. In the event that properly published written representations do not clearly benefits, the court. should consider all other evidence that would indicate the presence or absence of an informal plan. *Id.*

17. A court should consider an employer's practice of providing benefits to the employees of the same nature and kind for benefits provided to other classes of employees. *Cf. id.*

18. A court should consider internal or distributed documents relating specifically to the benefits sought. *Id.*

19. A court should consider oral representations by knowledgeable and authorized management employees, especially if a representation incorporates by reference the terms of a document or other plan relating specifically to the benefits sought. *Id.*

20. A court should consider the reasonable understanding of the employees concerning the specific benefits sought. *Id.* ("In determining an employee's reasonable understanding, the court may consider the employee's background knowledge of particular documents (such as union benefit plans) and whether any representations of the employer incorporated the terms of those documents").

21. A court should consider an employer's deliberate failure to con employees' known perceptions of the plan's existence. *Id.*

22. A court should consider a fund or account to pay the specific benefits sought. *Id.*

23. A court should consider actual payment of the specific benefits sought. *Id.*

24. A court should consider the intentions of the employer concerning the provision of the specific benefits pursuant to a plan. *Id.*

CLAIM FOR BENEFITS

25. A participant or beneficiary may recover the benefits due to him under the terms of his plan. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

26. The terms of a written employee benefit plan are determined by the provisions of the instrument as interpreted in light of all the circumstances and such other evidence of the intention of the sponsor with respect to the plan as is not inadmissible. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989).

27. Where oral remarks give evidence of a separate plan, not precluded by a written plan, the court may credit the representations as evidence of the terms of the plan. *See Henglein I*, 974 F.2d at 401.

28. If an employee benefit plan is published, and its terms are then rewritten in a subsequent unpublished document, an employee can choose which terms of the subsequent unpublished document will apply to him or her. *Cf. Morales v. Plaxall, Inc.*, 541 F. Supp. 1387,1391 (E.D.N.Y. 1982); *Ingrassia v. Shell Oil Co.*, 394 F. Supp. 875 (S.D.N.Y. 1975).

29. ERISA does not require a beneficiary to have any knowledge of a written plan's terms to recover benefits. *Henglein I*, 974 F.2d at 401.

30. A plan waives the application of any discretionary approval process when the sponsor imports new conditions into the plan, without notice to the affected employees, and dispenses with the case-by-case evaluations which are provided under the terms of the plan. *See Arthuis v. Colt Indus. Operating Corp.*, 971 F.2d 999, 1008 (3d Cir. 1992).

IDENTITY OF THE ADMINISTRATOR OF THE COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES

31. The successors to Crucible, Inc. are the administrator of the Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees by operation of law.

IDENTITY OF THE NAMED FIDUCIARIES OF THE COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES

32. The successors to the Retirement Board of Crucible, Inc., designated as the "Board of Review" in the 1968 document entitled "Early Severance and Disability Benefit Program," are the named fiduciaries of the Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees.

PARITY PLAN AND FRAUD

33. Count II (THE PARITY PLAN AND ENTITLE-MENT TO THE $400 MONTHLY SUPPLE-MENT) and Count III (PUNITIVE DAMAGES AND FRAUD) of the plaintiffs' Complaint have been dismissed by prior orders of this Court. The United States Court of Appeals for the Third Circuit upheld these dismissals in a final appeal.

CLAIMS OF PLAINTIFFS GEORGE W. HENGLEIN AND PAUL K. SCHAKE ARE NOT BARRED BY THE *DECISION IN SCHAKE V. COLT INDUS.. INC.*

34.. The plaintiffs in this lawsuit who were plaintiffs in the action entitled *Schake et al v. Colt Indus., Inc.*, Civil Action No. 83-2511, *vacated and remanded without opinion*, 791 F.2d at 920 (3d Cir. 1986), are not barred thereby from

asserting their claim for benefits in this action. The Court specifically finds that the Court of Appeals did not reach a determination that the alleged informal plan was not an ERISA-governed plan under the federal common law of ERISA, and therefore, it is not a final judgment on the merits.

35. The Court further finds that neither plaintiff George W. Henglein, nor plaintiff Paul K. Schake, is precluded from asserting his claim for benefits by reason of the rulings in *Schake v. Colt Indus., Inc.*, or in *Frank v. Colt Indus., Inc.*, 910 F.2d 101 (3d Cir. 1990).

36. While Schake and Henglein were not entitled to severance pay because they voluntarily resigned at a date not set by their employer, nevertheless, the existence of continuance agreements with them and their employer does not supplant or eliminate the previously established benefits to which they are entitled.

STATUTE OF LIMITATIONS

37. In suits to recover benefits from a plan, ERISA borrows the statute of limitations for the most analogous state claim. *Gluck v. Unisys Com.*, 960 F.2d 1168, 1179 (3d Cir. 1992).

38. In deciding the statute of limitations defense, the Court notes that ERISA lacks an applicable limitations statute and that courts are required to apply the most analogous state statute of limitations. *Vernau v. Vic's Market- Inc.*, 896 F. 2d 43 (3d Cir. 1990).

39. Claims that allegedly arise from circumstances that give immediate, obvious notice that something is amiss are analogous to past due wage claims. *Gluck*, 960 F.2d at 1181.

40. In Pennsylvania, litigants bring their claims for past due wages under the Pennsylvania Wage Payment and Collection Law. 43 Pa.C.S.A. § 260.9a(a).

41. The statute of limitations under the Pennsylvania Wage Payment and Collection Law runs for three years from the date on which such wages were due and payable. 43 Pa.C.S.A. § 260.9a(g).

42. Under the Pennsylvania Wage Payment and Collection Law, wages for separated employees become due and payable not later than the next regular payday of his employer on which such wages would otherwise be due and payable. 43 Pa.C.S.A. § 260-5.

43. The failure to commence payment of benefits marks the accrual of a single cause of action; the failure to make successive regular payments is not a "continuing violation."

44. Unlike a party to an installment contract seeking damages for a partial breach of the contract, a plan participant may bring a cause of action to clarify his rights to future benefits. *See* ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). *New Jersey State AFL-CIO v. New Jersey*, 747 F.2d 891 (3d Cir. 1984) (only participants. and beneficiaries may bring suit to clarify rights to future benefits under the terms of the plan); *International Ass'n of Bridge, Structural & Ornamental Iron Workers Local No. 111 v. Douglas*, 646 F.2d 1211 (7th Cir. 1981) (labor union has standing to sue under § 1132(a)(1)(B) on behalf of its members in order to clarify their future rights); *Chambliss v. Masters, Mates & Pilots Pension Plan*, 571 F. Supp. 1430 (S.D.N.Y. 1983) (declaratory judgment regarding clarification of future wages).

45. "Adopting [a continuing violation theory for the payment of wages and benefits] would effectively render the limitation period meaningless when the payment is received on a regular basis." *Casner v. American Fed'n of State, County and Mun. Employees*, 658 A.2d 865, 871 (Pa. Cmmwlth. Ct. 1995) (declining to adopt continuing violation theory in suit under Pennsylvania's Public Employees

Relation Act to compel union to submit grievances concerning wages and benefits).

46. In *Gluck v, Unisys Corp.*, 960 F. 2d 1168, 1181 (3d Cir. 1992), the court stated that the following limitations periods apply in Pennsylvania:

> First, claims for delinquent employer contributions or for payments past due that are most analogous to claims under the wage payment and collection law are governed by its three-year limitation, and measure from the date the delinquent payment was due. Second, claims to recover benefits that were bargained for but have not yet become payable most closely resemble contract claims for anticipatory breach, and are governed by Pennsylvania's four-year statute of limitations measured from the time when a claimant first knows that the benefit has been infringed or removed. Third, other ERISA claims such as those seeking to reinstate an improperly removed non-bargained-for benefit or to avoid a prohibited transaction, have no counterpart in Pennsylvania law and are thus governed by Pennsylvania's general six-year statute of limitations. [fn. 13 omitted].

47. The claim of the plaintiffs that the defendant did not raise limitation defenses until October 5, 1990, is without merit. (Plaintiffs' Proposed Findings of Fact and Conclusions of Law, Document No. 263 at p. 44, ¶ 4).

48. The claims of the plaintiffs, except E.P. Fahnert, J.P. Frenn, P.J. Hannon, E.T. Jones, J.R. Kundick and G.V. Peterson are barred by the applicable statute of limitations and therefore, should be dismissed with prejudice.[8]

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[8] Because the applicable statute of limitations is a crucial element of the Court's conclusion, the Court believes it is important to elaborate on this issue and does so in the attached Appendix "A."

MISCELLANEOUS

49. Because the parties have stipulated that if this Court finds that the defendant existed in 1982 and determines its terms and conditions in 1982, the Court should "remand" the claims of the plaintiffs to the plan administrator of the defendant, the Court will remand the claims of the plaintiffs, E.P. Fahnert, J.P. Frenn, P.J. Hannon, E.T. Jones, J.R. Kundick and G.V. Peterson to the plan administrator. Under these stipulations and at the present posture of this case, the defendant does not need to assert that the plaintiffs have failed to administratively exhaust their individual claims for benefits.

50. Payments to those six plaintiffs entitled to benefits pursuant to these fin of fact and conclusions of law shall be charged to the organizational unit to which the plaintiff in question was assigned at the time of his or her severance, or the payroll department thereof, or the successors in title and interest thereof.

51. The defendant's contention that it has no liability because it had an unrestricted discretionary power to select or reject employees as participants has been disposed of by the law of the case. The discretionary benefits do not defeat the existence of plan; they merely constitute a plan that assigns discretionary benefits. The Court must determine if an ERISA plan exists, and then determine if its benefits are discretionary. If benefits are discretionary, the question is whether their denial was an abuse of discretion.[9]

52. The Court finds that there is not sufficient competent evidence to support the plaintiffs' contention that the company supplemented the 1968 plan so as to provide a

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[9] *See Henglein I*, 974 F.2d at 401. The Court rejects the defendant's "standing" defense which is substantially a rehash of the discretionary powers defense asserted previously in the district court and before the Court of Appeals.

$400 monthly plant shutdown benefit identical to that payable to union employees pursuant to the "Pension Agreement effective July 31, 1980 for Employees of Colt Industries Crucible, Inc., Established Pursuant to Agreement with the United Steelworkers of America."

53. The action of Crucible, Inc., in amending and rewriting the Early Severance and Disability Benefit Program effective February 10, 1969, did not impair any of the plaintiffs' then existing rights.

54. Unless otherwise barred, any participant of the Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees is eligible for benefits automatically upon the occurrence of a plant or department shutdown and the consequent permanent loss of employment as a matter of law in all cases in which the plan was not officially being administered.

55. Unless otherwise barred, any participant of the Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees who is eligible for benefits as set forth under the heading "*EARLY SEVERANCE BFNEFIT*" or under the heading "*20-30 YEAR RETIREMENT*" in 1968 document entitled "Early Severance and Disability Benefit Program," as amended by the 1969 Hardship Retirement Guidelines can, by operation of law, apply for any benefit for which he or she meets the age and years of services requirements described therein.

Conclusion

An appropriate order will be entered dismissing with prejudice the claim of each and every one of the plaintiffs except E.P. Fahnert, J.P. Frenn, P.J. Hannon, E.T. Jones, J.R. Kundick and G.V. Peterson, whose claims will be remanded to the plan administrator of the defendant for disposition consistent with the findings of fact and conclusions of law set forth herein.

The Court is compelled to note that the closing of the Crucible plant in Midland, Pennsylvania, and related facilities in 1982 is just one more closing in the long saga of steel plant closings that occurred in Western Pennsylvania causing disruption to the economy and the lives of the participants.

Based on the Court's observation, it appears that all of the plaintiffs who testified were dedicated and loyal employees of Crucible, Inc., at the time of the closing of the facilities in Midland, Pennsylvania, and Lawrenceville, Pennsylvania, and the various support facilities located in Robinson Township, Pennsylvania. Moreover, some of the plaintiffs were third-generation employees at the plant and it is obvious that most, if not all, of the plaintiffs believe they were betrayed by Crucible, Inc., under the totality of the circumstances.

On the other hand, it appears that the management of Crucible, Inc., was dismayed and shocked by the steelworkers' rejection of what appears to have been a sincere company plan requiring various concessions by applicable unions to save the plant. That plan was formulated by representatives of the union, plant management, and the community.

Without the Court attempting to fix the blame, if any, for the sorry state of affairs, it is abundantly clear that the enforcement of the environmental regulations and foreign competition were the most important reasons for the many area plant closings.

Having said all of the above, were the Court operating a facility like that in Midland, Pennsylvania, it certainly would, without hesitation, employ persons of the plaintiffs' caliber.

Lee, J.

APPENDIX "A"

Although ERISA provides a specific limitations period for breaches of fiduciary obligations, 29 U.S.C. § 1113, it does not contain a limitations period for non-fiduciary claims brought by beneficiaries to recover benefits under ERISA's civil enforcement provisions, 29 U.S.C. § 1132. Therefore, in the absence of an applicable ERISA limitation, federal courts must apply the most analogous state statute of limitations. *Vernau v. Vic's Market. Inc.*, 896 F.2d 43, 45 (3d Cir. 1990).

Claims that allegedly arise from circumstances that give immediate, obvious notice that something is amiss are analogous to past due wage claims. *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1181 (3d Cir. 1992). The Court finds that the Pennsylvania Wage Payment and Collection Law is the most analogous state statute to plaintiffs' claims for past due benefits. *See Vernau v. Vic's Market. Inc.*, 896 F.2d 42 (3d Cir. 1989); and *Teamsters Pension Trust Fund v. John Tinney Delivery Serv.*, 732 F.2d 319, 322 (3d Cir. 1984).[10] The Court of Appeals for the Third Circuit has instructed that ERISA claims for payments past due that are most analogous to claims under the Pennsylvania Wage Payment and Collection Law are governed by its three.-year limitation," [11] and are "measured from the date the delinquent payment was due." *Gluck*, 960 F.2d at 1181 (emphasis added).

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[10] The Court recognizes that Judge Scirica believes that the Court of Appeals for the Third Circuit may wish to reconsider applying *Tinney* to ERISA. *Vernau*, 896 F.2d at 45, n.5. However, until such time, this Court must follow the directive of the appellate court and apply the three-year statute of limitations period found in Pennsylvania's Wage Payment and Collection Law.

[11] The Wage Payment and Collection Law's limitation provides, in pertinent part: "No administrative proceedings or legal action shall be instituted under provisions of this act for the collection of unpaid wages or liquidated damages more than three years after the day on which such wages were due and payable . . ." 43 Pa. Stat. Ann. § 260.9a(g).

"As a matter of general rule, a party asserting a cause of action is under a duty to use all reasonable diligence to be properly informed of the facts and circumstances upon which a potential rights of recovery is based and to institute suit within the prescribed statutory period." *Casner v. American Fed'n of State, County and Mun. Employees*, 658 A.2d 865, 870 (Pa. Commw. 1995) (citing *Pocono Int'l Raceway v. Pocono Produce*, 468 A.2d 468, 471 (Pa. 1983)). In Pennsylvania, "the statutory period commences at the time the harm is suffered or, if appropriate, at the time the alleged malpractice is discovered . . . . Determining when a cause of action arises or accrues is to establish when the plaintiff could have first maintained the action to a successful conclusion." *Casner*, 658 A.2d at 871 (internal citations omitted).

In this case, the statute of limitations began to run as soon as the plaintiffs' right to file and maintain a suit against defendant arose. By plaintiffs' own admissions, the 1968 informal plan was common knowledge among plaintiffs. Ps' Proposed Findings of Fact and Conclusions of Law, p. 1 (Doc. No. 263). In other words, the plaintiffs' individual claims accrued and the statute of limitations began to run no later than the date of which each individual was terminated and was told that he or she would not receive any plant shutdown benefits.

The Complaint in this matter was filed on September 24, 1986. Defendant contends that the claims of all but six plaintiffs [12] are time barred as plaintiffs filed their claims over three years from the date any such claims accrued. With the exception of the termination dates of the six employees identified in footnote 2, the termination dates of the remaining plaintiffs occurred between March 31, 1982 and September 15, 1983.

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[12] These individuals and their termination dates are as follows: E. P. Fahnert, 04/30/84; J. P. Frenn, 04/30/84; P. J. Hannon, 9/30/84; E. T. Jones, 11/27/84; J. R. Kundick, 06/30/86; and G. V. Peterson, 05/13/84.

Plaintiffs respond that any statute of limitations defense was waived by defendant because (i) defendant failed to move for summary judgment on this issue and (ii) defendant did not assert a statute of limitations argument until October 5, 1990, when defendant moved that additional plaintiffs not be permitted to join the case because their claims were time barred. Both arguments of plaintiffs must fail for the following reasons.

Plaintiffs have no support for their assertion that defendant waived its statute of limitations argument by not moving for summary judgment. While the Court recognizes that this issue may have been particularly appropriate for a summary judgment motion, defendant was not at any time obligated to file a summary judgment motion on this issue. In fact, the clear language of Rule 56 of the Federal Rules of Civil Procedure reflects that the decision to move for summary judgment is a discretionary decision ("[a] party . . . may . . . move summary judgment. argument is without merit.

Plaintiffs' second argument likewise must fail. Plaintiffs contend that the first time defendant raised the statute of limitations defense was in October, 1990, in response to plaintiffs' motion to add additional plaintiffs. However, the record clearly reflects that plaintiffs' contention is factually flawed. In its original Answer, filed on or about July 29, 1989, defendant set forth as its Sixth Defense that "[t]he claims set forth in the Complaint are barred by the applicable statute of limitations." Def's Answer, p. 7, Document No. 20. Accordingly, defendant did not waive this affirmative defense as it fully complied with the requirements of Federal Rule of Civil Procedure 8(c).

Furthermore, defendant raised the limitations defense in the parties' joint Pretrial Stipulation, filed on July 15, 1996 (Document No. 250, p. 76-78) and in defendant's Post-Trial Proposed Findings of Fact and Conclusions of Law, filed October 1, 1996 (Document No. 264, ¶¶ 177-189). The Court

notes that at no time did plaintiffs ever move to strike any of these documents nor did plaintiffs argue that the limitations defense was waived because the answer was untimely filed.

Because plaintiffs, with the exception of those six previously identified, were terminated between March 31, 1982 and September 15, 1983, and this action was brought on September 24, 1983, plaintiffs' claims are barred by the applicable three-year statute of limitations, unless its running is tolled or a continuing violation can be found to have occurred.

The United States Supreme Court has directed that state tolling principles are generally to be used by a federal court when it is applying a state limitations period. *Johnson v, Railway Express Agency. Inc.*, 421 U.S. 454 (1975). "In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim." *Id.* at 463-64.

Under Pennsylvania tolling principles, the statute is tolled until "plaintiffs knew or using reasonable diligence should have known of the claim. The Supreme Court of Pennsylvania views tolling of the statute of limitations in terms of the 'knew or should have known' standard,[13] whether the statute is tolled because of the discovery rule or because of fraudulent concealment." *Vernau*, 896 F.2d at 46 (internal citations omitted). "Regardless of the grounds for seeking to toll the statute, the plaintiff is expected to exercise reasonable

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[13] Knowledge of the claim has been defined: "plaintiffs need not know that they have a cause of action or that the injury was caused by another party's wrongful conduct for once a plaintiff possesses the salient facts concerning the occurrence of his injury and who or what caused it, he has the ability to investigate and pursue his claims." *Vernau*, 896 F.2d at 46 (*quoting Berardi v. Johns-Manville Corp.*, 482 A.2d 1076, 1071 (Pa. Super. 1984)).

diligence [14] in attempting to ascertain the cause of any injury." *Beauty Time. Inc, v, VU Skin Systems*, ___ F.3d ___, No. 96-3572, 1997 WL 366018 at *3 (3d Cir. July 3, 1997).

As the Court of Appeals for the Third Circuit has observed "there are few facts which diligence cannot discover, but there must be some reason to awaken inquiry and suggest investigation." *Id.* (citing *Urland v. Merrell-Dow Pharmaceuticals*, 822 F.2d 1268, 1273 (3d Cir. 1987)).

In the instant case, plaintiffs argue that the company deliberately failed to correct known perceptions of the informal plan's existence. However, even taking plaintiffs' position as true, there is no question of when each plaintiff knew or should have known that he would not be receiving shut down benefits. As soon as plaintiffs were terminated and were notified that they would not be receiving shut down benefits, the three-year statute of limitations began to run. Therefore, any discussion of tolling the statute of limitations is irrelevant and unpersuasive.

Likewise, any discussion regarding defendant committing a continuing violation is also irrelevant and unpersuasive. For the continuing violation theory to be helpful to plaintiffs, plaintiffs must show that their causes of action are ongoing, recommencing with each pay period because plaintiffs sustain losses of pay with each pay check. The Court finds this position unpersuasive.[15]

While the Court of Appeals for the Third Circuit has not addressed directly the continuing violation theory in a non-

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[14] Reasonable diligence has been defined as: "[A] fair, proper and due degree of care and acting, measured with reference to the particular circumstances; such diligence, care, or attention as might be expected from a man of ordinary prudence and activity." *Beauty Time, Inc.*, 1997 WL 366018 at *3.

[15] Plaintiffs have never asserted that the statute of limitations was tolled or that the nonpayment of shutdown benefits was a continuing violation.

fiduciary ERISA case, it has expressed its concern about extending the statute of limitations in this type of case. *See Gluck* , 960 F.2d at 1181. ("A claim for an ERISA violation affecting the retirement benefit of a twenty-year old employee might accrue 45 years later, when the benefit would be "due and payable. Although the doctrine of laches might preclude the action, we are unwilling to open the door to a 48-year limitations period.").

Likewise, the Pennsylvania Supreme Court has not decided when, if ever, a continuing violations theory is viable under the Pennsylvania Wage and Collection Law. However, the Pennsylvania Commonwealth Court rejected the continuing violation theory in *Casner v. American Federation of State, County, and Municipal Employees*, 658 A.2d 865 (Pa. Commw. 1995). Although *Casner* dealt with payments actually being made periodically, rather than the failure to make payments as alleged here, the Court finds the commonwealth court's reasoning applicable to this case.

In *Casner*, eight workers sued their union, seeking to compel it to arbitrate their claims that it had breached its duty of fair representation. In response to the union's argument that the suit was time barred, the plaintiffs contended that the limitations period began anew each time they received a pay check with smaller pay and benefits. Rejecting this argument, the commonwealth court stated:

> Petitioners contend that AFSCME committed a continuing violation and that their causes of action are ongoing, recommencing with each pay period because Petitioners sustain losses of pay and benefits with each pay check. We find this position unpersuasive. Adopting this rationale would effectively render the limitation period for any cause of action alleging loss of payment meaningless when the payment is received on a regular basis. "[T]he purpose of a statute of limitations is to bar stale claims and avoid problems of proof arising from

> stale memories." (internal citation omitted.) Accepting Petitioners' continuing violation theory would hinder and frustrate the ultimate aim of limitations periods. We hold that Petitioners' causes of action are not continuing.

Casner, 658 A.2d at 871.

Similar to the instant case, in *Yingling v. Unum Life Ins. Co.*, 959 F. Supp. 251 (M.D. Pa. 1997), a diversity action controlled by Pennsylvania law, the district court was faced with the issue of whether defendant's failure to pay monthly disability benefits was an ongoing breach of the insurance contract which the parties had entered into. Following the reasoning of *Casner*, the court rejected plaintiffs attempt to keep his case alive under the continuing-violation theory.

Finally, in a case very analogous to the instant matter, *Adamson v. Armco. Inc.*, the Court of Appeals for the Eighth Circuit rejected the plaintiff's continuing-violation theory in an ERISA action brought by former employees of the defendant seeking benefits due under terminated plans. Finding that plaintiffs claims were barred by the applicable Minnesota two-year statute of limitations, the Court stated that the defendant's refusal to pay benefits was not a continuing breach of the plans as the "causes of action accrued when the plans were terminated and ceased paying benefits. . . ." *Adamson*, 44 F.3d 650, 654 (8th Cir. 1995).

This Court, guided by the comments of the Court of Appeals for the Third Circuit in Gluck, and adopting the reasoning of the *Casner*, *Yingling* and *Adamson* courts, finds that plaintiffs' causes of action are not continuing.[16] Further

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[16] The Court recognizes that the approach it is taking is contrary to the position of the Court of Appeals for the Ninth Circuit. *See Meagher v. International Ass'n of Machinists*, 856 F.2d 1418, 1423 (9th Cir. 1988), wherein the appellate court stated that each reduced check issued to plaintiff constituted a "fresh check" and the limitations period runs separately for each cause of action.

bolstering the Court's conclusion that this is not a continuing violation is § 502(a)(1)(B) of ERISA which affords the participants a right to file a civil action to recover benefits due under the term of the plan, to enforce rights under the terms of the plan, or to clarify rights to future benefits under the terms of the plan, Accordingly, plaintiffs' claims, with the exception of the six previously-identified plaintiffs, are time barred.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 86-2021

GEORGE W. HENGLEIN, L.C. ALBACKER, R.B. ANDREWS, R.L. APPELDORN, R.H. ASHENBAUGH, A.L. AUSTIN, J.W. BAGOSI, J.D. BALSER, A. BARRASSO, J.O. BAUER, E.E. BEST, H.W. BIGLEMAN, C.R. BLAZIER, J.P. BRESSANELLI, G.D. BROWN, F.C. BUCHHOLZ, E.C. CALVIN, R.R. CAMPBELL, P.D. CASTELLANO, J.L. CERASI, E. CHAPMAN, S. CHRISTY, T.M. COSTELLO, C.A. DAUKA, A.J. DECOSTA, M.G. DEGRANDE, A.S. DICCIO, A.P. DIMARZIO, C.J. DIMARZIO, R.J. DOUGHERTY, M. DRUGA, E.P. ERATH, E.P. FAHNERT, H. FARRINGTON, M. FERLAINO, R.D. FEYDO, E.R. FINGER, J.N. FLARA, N.E. FREDERICK, J.P. FRENN, R.E. FRONKO, L.L. GIBBS, W.L. GLEASON, L.E. GORDON, R.W. GOTT, J.E. GRIMM, P.E. GRUBBS, E.R. GUERRA, A.J. GULUTZ, J.T. HAAF, J.D. HAMACHER, P.J. HANNON, R.M. HANSEN, M.I. HARPHAM, D.H. HELDMAN, J.K. HILE, R.S. HOGSETT, R.T. HOPPER, H.M. HOWELL, W.M. HYAMS, J.M. JANKE, C.L. JOBE, JR., K.H. JOHNS, R.O. JOHNSON, JR., E.T. JONES, R. KAO, D.P. KERR, JR., P.A. KEYS, R.W. KNALLAY, E.E. KNAPEK, W.J. KOFALT, S.W. KOHLER, T. KOMINITSKY, T.R. KRUPA, P.R. KULLEN, J.R. KUNDICK, W. LAKE, D.F. LAVENE, T.T. LEHMANN, R.H. LEWIS, R.A. LIPPERT, W.R. LIVINGSTON, J.H. LUTTON, A.J. LYNN, D.B. MCCLAIN, J.L. MCKAIN, P.F. MCNICOL, E.L. MARSH, F.S. MATSUKAS, H.J. MERCER, A.R. MIDDLETON, M. MITROVICH, M.A. MOLCHAN, R.A. MONTGOMERY, R.T. MORELLI, A.N. MORRISON, H. MRAUNAC, M.R. MUCKIAN, C.W. MURRAY, III, C.J. MYERS, L.V. NAGLE, D.A. NOBERS, J.A. NUZO, E. ORDICH, W.H.ORR, T.H. PARSONS, A.J. PASKO, JR., H.S. PEASE, III, G.J. PESCION, G.V. PETERSON, J.J. POPP, G.P. PORTO, G. POSTICH, D.E.

POWELL, R.W. PRENTICE, J.V. PRESUTTI, W.C. PRICE, L.E. RAYNOVICS, T.R. REED, J.W. REIDER, J.J. ROSE, A.J. ROSEPILLER, C.S. RUSSELL, K.E. SANDERS, M.A. SARVER, P.K. SCHAKE, J.W. SCHOLTZ, A.H. SCHELINE, M.L. SHERRY, F.R. SHUSS, W.W. SIMPSON, A.E. SIX, J.E. SMITH, E.H. SPAZIANI, W.H. STEPHENS, C.D. STROSNIDER, J.F. SUFFOLETTA, H.L. TAYLOR, K.E. THOMAS, F.S. THORNBERRY, JR., J.R. TICE, D.A. TOWNLEY, R. TRBOVICH, R.T. TURNER, H.B. VAN FOSSEN, R.R. VLAH, A. VRANES, S. VRANES, D.W. WARE, K.G. WASSMAN, JR., G.T. WEEKLEY, E.M. WERRIES, JR., D.L. WESTFALL, J.A. WHITEHEAD, R.J. WHITTEN, C.K. WILDMAN, T. WILLIAMS, JR., T.H. WILLS, JR., A.J. YANNI, L.H. YOUNG, JR., R.C. YOUNG, H.F. YUTE, W.I. ZAZWIRSKY, AND JOHN K. DOUGLAS,

Plaintiffs,

VS.

COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES,

Defendant.

ORDER OF COURT

AND NOW, this 5th day of August, 1997, it is hereby ORDERED AS FOLLOWS:

1. The claims of all of the plaintiffs, except E.P. Fahnert, J.P. Frenn, P.J. Hannon, E.T. Jones, J.R. Kundick and G.V. Peterson are DISMISSED WITH PREJUDICE.

2. The claims of E.P. Fahnert, J.P. Frenn, P.J. Hannon, E.T. Jones, J.R. Kundick and G.V. Peterson for benefits, including paid-up life insurance, are hereby remanded to the plan administrator of the defendant plan

for disposition consistent with the findings of fact and conclusions of law set forth herein.

3. The Court will retain jurisdiction of the claims of the plaintiffs, E.P. Fahnert, J.P. Frenn, P.J. Hannon, E.T. Jones, J.R. Kundick and G.V. Peterson, to insure that the claims, are administered properly by the plan administrator in a manner consistent with the findings of fact and conclusions of law set forth herein.

/s/ _____
Donald J. Lee
United States District Judge

cc James J. Ahearn, Esquire
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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 86-2021

GEORGE W. HENGLEIN, L.C. ALBACKER, R.B. ANDREWS, R.L. APPELDORN, R.H. ASHENBAUGH, A.L. AUSTIN, J.W. BAGOSI, J.D. BALSER, A. BARRASSO, J.0. BAUER, E.E. BEST, H.W. BIGLEMAN, C.R. BLAZIER, J.P. BRESSANELLI, G.D. BROWN, F.C. BUCHHOLZ, E.C. CALVIN, R.R. CAMPBELL, P.D. CASTELLANO, J.L. CERASI, E. CHAPMAN, S. CHRISTY, T.M. COSTELLO, C.A. DAUKA, A.J. DECOSTA, M.G. DEGRANDE, A.S. DICCIO, A.P. DIMARZIO, C.J. DIMARZIO, R.J. DOUGHERTY, M. DRUGA, E.P. ERATH, E.P. FAHNERT, H. FARRINGTON, M. FERLAINO, R.D. FEYDO, E.R. FINGER, J.N. FLARA, N.E. FREDERICK, J.P. FRENN, R.E. FRONKO, L.L. GIBBS, W.L. GLEASON, L.E. GORDON, R.W. GOTT, J.E. GRIMM, P.E. GRUBBS, E.R. GUERRA, A.J. GULUTZ, J.T. HAAF, J.D. HAMACHER, P.J. HANNON, R.M. HANSEN, M.I. HARPHAM, D.H. HELDMAN, J.K. HILE, R.S. HOGSETT, R.T. HOPPER, H.M. HOWELL, W.M. HYAMS, J.M. JANKE, C.L. JOBE, JR., K.H. JOHNS, R.O. JOHNSON, JR., E.T. JONES, R. KAO, D.P. KERR, JR., P.A. KEYS, R.W. KNALLAY, E.E. KNAPEK, W.J. KOFALT, S.W. KOHLER, T. KOMINITSKY, T.R. KRUPA, P.R. KULLEN, J.R. KUNDICK, W. LAKE, D.F. LAVENE, T.T. LEHMANN, R.H. LEWIS, R.A. LIPPERT, W.R. LIVINGSTON, J.H. LUTTON, A.J. LYNN, D.B. MCCLAIN, J.L. MCKAIN, P.F. MCNICOL, E.L. MARSH, F.S. MATSUKAS, H.J. MERCER, A.R. MIDDLETON, M. MITROVICH, M.A. MOLCHAN, R.A. MONTGOMERY, R.T. MORELLI, A.N. MORRISON, H. MRAUNAC, M.R. MUCKIAN, C.W. MURRAY, III, C.J. MYERS, L.V. NAGLE, D.A. NOBERS, J.A. NUZO, E. ORDICH, W.H.ORR, T.H. PARSONS, A.J. PASKO, JR., H.S. PEASE, III, G.J. PESCION, G.V.

PETERSON, J.J. POPP, G.P. PORTO, G. POSTICH, D.E. POWELL, R.W. PRENTICE, J.V. PRESUTTI, W.C. PRICE, L.E. RAYNOVICS, T.R. REED, J.W. REIDER, J.J. ROSE, A.J. ROSEPILLER, C.S. RUSSELL, K.E. SANDERS, M.A. SARVER, P.K. SCHAKE, J.W. SCHOLTZ, A.H. SCHELINE, M.L. SHERRY, F.R. SHUSS, W.W. SIMPSON, A.E. SIX, J.E. SMITH, E.H. SPAZIANI, W.H. STEPHENS, C.D. STROSNIDER, J.F. SUFFOLETTA, H.L. TAYLOR, K.E. THOMAS, F.S. THORNBERRY, JR., J.R. TICE, D.A. TOWNLEY, R. TRBOVICH, R.T. TURNER, H.B. VAN FOSSEN, R.R. VLAH, A. VRANES, S. VRANES, D.W. WARE, K.G. WASSMAN, JR., G.T. WEEKLEY, E.M. WERRIES, JR., D.L. WESTFALL, J.A. WHITEHEAD, R.J. WHITTEN, C.K. WILDMAN, T. WILLIAMS, JR., T.H. WILLS, JR., A.J. YANNI, L.H. YOUNG, JR., R.C. YOUNG, H.F. YUTE, W.I. ZAZWIRSKY, AND JOHN K. DOUGLAS,

Plaintiffs,

vs.

COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES,

Defendant.

December 23, 1998

MEMORANDUM OPINION

Before the Court are the plaintiffs' Exceptions to the Retirement Board's decision with regard to benefits owing to the prevailing plaintiffs.

The plaintiffs' exceptions are embodied in their Memorandum Re the Calculation of Informal Plan Benefits and the Findings of the Retirement Board (Document No. 352) and Plaintiffs' Reply to the Defendant's Memo-

randum of November 6, 1998 Concerning the Calculation of Informal Plan Benefits (Document No. 358).

The defendant has responded in its Memorandum in Response to Plaintiffs' Exceptions (Document No. 354) and the Addendum Regarding Calculation Methods for 1968 Plan.

The exceptions and the Court's disposition thereof are as follows:

> (i) The plaintiffs except to the Retirement Board's calculation of "final salary" based on the compensation received by each of the plaintiffs for the ten-year period prior to December 1, 1972, rather than the period from 1972 to 1982, when the plant closed and the plaintiffs' employment was terminated.

Based on an unpublished and uncommunicated resolution of the Board of Directors of the plan sponsor dated December 1. 1972, which by its provisions purports to terminate the 1969 informal plan, the defendant contends that such resolution proves "that the plan sponsor did not intend for any additional benefits to accrue after that date." (Defendant's Memorandum in Response to Plaintiffs' Exceptions, p. 5). Moreover, the defendant asserts "in light of the provisions of the 1957 Plan, it is crystal clear that this Court must review the Board's conclusions on both eligibility and benefits under an abuse of discretion standard" rather than a de novo review. *Id.* at 4.

Disposition

The Court sustains the exception of the plaintiffs and hereby directs the Board to calculate the pension benefits based on the plaintiffs' average salary for the ten-year period prior to termination of the employment of each of the plaintiffs upon the closing of the Midland, Pennsylvania, plant.

Initially, with regard to the standard of review, the Court notes that while the 1957 plan creating the Retirement Board states that.

> The Retirement Board . . . shall make determination of all questions arising out of or in connection with the provisions of the Restated Plan not herein required to be determined by the Board of Directors and any such determination shall be conclusive and binding. . .,

the 1968 plan provides:

> ADMINISTRATION OF THE PLAN
>
> The Retirement Board appointed under the terms of the Restated Employees' Retirement Plan shall also act as a Board of Review to authorize benefits under the Early Severance and Disability Benefit Program. The Retirement Board is given authority and responsibility for final determination of eligibility of individual employees for benefits under this Plan. After a determination of eligibility by the Retirement Board, the administration of the program is the responsibility of the Employees' Benefits Department.

After considering the totality of the facts and circumstances adduced at the trial, the Court, in Finding of Fact No. 237, held that the above language fails to provide any standard for the Retirement Board acting as the Board of Review to use in discharging its duties under the plan.

With regard to the effect of the December 1, 1972 resolution of the Board of Directors, in Henglein III, the Court of Appeals stated:

> Although the district court held that the merger between Colt and Crucible terminated the 1968 plan, we note that it is uncontroverted that the termination of the 1968 plan was never communicated to the employees. Second, the creation of the 1969 plan and its termination in 1972

> were never communicated to the employees. Therefore. because the employees had no knowledge of Colt's action. the suggestion that the 1969 plan superseded the 1968 plan is unfounded. *Similarly. the termination of the 1969 plan by an unpublished-board resolution would have no effect on the employees' reliance on either the 1968 or the 1969 plan.* (Emphasis supplied).

Henglein III, No. 94-3074, slip. op. at pp. 19 and 20 (3d Cir. September 26, 1994).

Based on the totality of the facts and circumstances, this Court also found:

> 230. The Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees as herein determined to be legally constituted in 1982 provided and continues to provide benefits as set forth under the heading "*EARLY SEVERANCE BENEFIT*" and under the heading "*20-30 YEAR RETIREMENT*" in the 1968 document entitled "Early Severance and Disability Program," as amended, regardless of any provisions describing a selection and approval process.

In any event, were the standard of review as urged by defendant, the Court would nevertheless find the Board's determination to be arbitrary. The Board's decision is clearly contrary to the findings of this Court as based on the opinions of the Court of Appeals in *Henglein I, II* and *III* (citations omitted). Consequently, the Court finds that the December 1, 1972 Board of Directors' resolution did not cut off the plaintiffs' additional benefits accruing thereafter.

> (ii) The plaintiffs except to the finding of the Retirement Board which does not provide for an adjustment to income during the relevant ten-year period of 1972 to 1982 to reflect the "severe inflation" which allegedly occurred.

In that regard, plaintiffs urge the Court to apply the type of "index" employed by the Social Security Administration which credits a larger income to allow for the buying value of income earned during periods of inflation.

Disposition

The plaintiffs' exception is dismissed. Plaintiffs neither point to any provision in the relevant plan that provides for an adjustment for inflation, nor point to any authority which would otherwise form a basis for same. Moreover, the Court notes that the definition of final salary in the 1957 plan excludes "any compensation other than salary or wages," and therefore by its terms would appear to exclude any adjustment for inflation.

(iii) The plaintiffs except to the Retirement Board's determination that it would not object to an award of prejudgment interest, based on the average 52-week Treasury bill rate, commencing on the date plaintiffs filed suit.

The plaintiffs also except to a "flat average rate" being applied to all of the benefits due plaintiffs and contend that the prevailing interest for every six-month period should be applied separately throughout the entire number of years during which benefits were withheld. Moreover, plaintiffs claim compound interest from the point in time when the employees first satisfied the conditions of eligibility, particularly because the benefits were wrongfully withheld.

Disposition

It is clear that the Court has discretion to grant prejudgment interest. Such an award is to be granted based on the "considerations of fairness [and] denied when its exaction would be inequitable." *Ambromovage v, United Mineworkers*, 726 F.2d 972, 981-82 (3d Cir. 1984).

Exercising its discretion. the Court finds that the applicable and appropriate rate of prejudgment interest on the benefits due plaintiffs shall be calculated in accordance with 28 U.S.C. § 1961 (a) and is the average of the 52-week Treasury bill rate from the date prejudgment interest is first due until the date of judgment. Moreover, the Court finds that the date from which prejudgment interest is first due is the date upon which each plaintiff became entitled to benefits which, at the least, is the date of each plaintiffs exit interview following his termination when it was represented that plant shutdown benefits were no longer in existence. *See Hardtke v. Exide Corp.*, 821 F. Supp. 1021, 1031 (E.D. Pa. 1993) (prejudgment interest awarded from date plaintiff denied separation pay to the date of his filing a writ of summons). *Pierce v. American Waterworks Co.. Inc.*, 683 F. Supp. 996 (W.D. Pa. 1988) (prejudgment interest to run from the "date plaintiff would have started receiving pension benefits had he been properly granted them").[1]

> (iv) The plaintiff, Fahnert, excepts to the determination of the Retirement Board that the amount of his life insurance is properly based on his salary as of December 1, 1972, rather than the date of his termination.

The plaintiff, Kundick, excepts to the Retirement Board's denial of his life insurance protection on the ground that he was ineligible under the plan.

Moreover, both Messrs. Fahnert and Kundick contend they are entitled to the accumulated value of the life insurance protection that should have been in force for them since the dates of their terminations.

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[1] The Court in Pierce applied the average post-judgment rate for the period from the date that the plaintiff should have received pension benefits to the date of the decision due to the inflation fluctuation of the post-judgment rate during that period.

Disposition

The Court will sustain the exceptions in part and dismiss them in part.

Based on its ruling as to the relevant ten-year period, the Court finds that Mr. Fahnert is entitled to life insurance coverage based on his salary level as of the date of the termination of his employment.

With regard to Mr. Kundick, the Court notes that pursuant to the Retirement Board's suggestion, he has applied to the administrator of the Crucible Life Insurance Plan which has favorably determined he is eligible for same and therefore, such exception is dismissed.

The Court finds there is no authority or basis for the contention of Fahnert and Kundick that they are entitled to the accumulated value of their life insurance which should have been in force from the date of their terminations and therefore, such exceptions are dismissed.

(v) The plaintiffs except to the failure of the Retirement Board to award the plaintiffs an additional amount equal to what they had been receiving from the formal plan plus what they should have been receiving from the informal plan.

Disposition

The Court will deny this exception without prejudice because the plaintiffs have failed to explain how the additional payment should or would be determined and have failed to properly explain their entitlement to same.

An appropriate order remanding the determination of benefits to the Retirement Board for its calculation of benefits in accordance with this opinion shall be entered.

Lee, J.

APPENDIX C

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Nos. 00-2529, 00-2746

GEORGE W. HENGLEIN; L.C. ALBACKER; R.B. ANDREWS; R.L. APPELDORN; R.H. ASHENBAUGH; A.L. AUSTIN; J.W. BAGOSI; J.D. BALSER; A. BARRASSO; J.O. BAUER; E.E. BEST; H.W. BIG LEMAN; C.R.BLAZIER; J.P. BRESSANELLI; G.D. BROW N; F.C. BUCHHOLZ; E.C. CALVIN; R.R. CAMPBELL; P.D. CASTELLANO; J.L. CERASI; E. CHAPMAN; S. CHRISTY; T.M. COSTELLO; C.A. DAUKA; A.J. DECOSTA; M.G. DEGRANDE; A.S. DICCIO; A.P. DIMARZIO; C.J. DIMARZIO; R.J. DOUGHERTY; M. DRUGA; E.P. ERATH; E.P. FAHNERT; H. FARRINGTON; M. FERLAINO; R.D. FEYDO; E.R. FINGER; J.N. FLARA; N.E. FRED ERICK; J.P. FRENN; R.E. FRONKO; L.L. GIBBS; W.L. GLEASON; L.E. GORDON; R.W. GOTT; J.E. GRIMM; P.E. GRUBBS; E.R. GUERRA; A.J. GULUTZ; J.T. HAAF; J.D. HAMACHER, JR.; P.J. HANNON; R.M. HANSEN; M.I. HARPHAM; D.H. HELDMAN; J.K. HILE; R.S. HOGSETT; R.T. HOPPER; H.M. HOWELL; W.M. HYAMS; J.M. JANKE; C.L. JOBE; K.H. JOHNS; R.O. JOHNSON, JR.; E.T. JONES; R. KAO; D.P. KERR, JR.; P.A. KEYS; R.W. KNALLAY; E.E. KNAPEK; W.J. KOFALT; S.W. KOHLER; T. KOMINITSKY; T.R. KRUPA; P.R. KULLEN; J.R. KUNDICK; W. LAKE; D.F. LAVENE; T.T. LEHMANN; R.H. LEWIS; R.A. LIPPERT; W.R. LIVINGSTON; J.H. LUTTON; A.J. LYNN; D.B. MCCLAIN; P.F. MCNICOL; E.L. MARSH; F.S. MATSUKAS; H.J. MERCER; A.R. MIDDLETON; M. MITROVICH; M.A. MOLCHAN; R.A. MONTGOMERY; R.T. MORELLI; A.N. MORRISON; H. MRAUNAC; M.R. MUCKIAN; C.W. MURRAY, III; C.J. MYERS; L.V. NAGLE; D.A. NOBERS; J.A. NUZO; E. ORDICH; W.H. ORR; T.H. PARSONS; A.J. PASKO; H.S. PEASE, III; G.J. PESCION; G.V. PETERSON; J.J. POPP; G.P.

PORTO; G. POSTICH; D.E. POWELL; R.W. PRENTICE; J.V. PRESUTTI; W.C. PRICE; L.E. RAYKOVICS; T.R. REED; J.W. REIDER; J.J. ROSE; A.J. ROSEPILLER; C.S. RUSSELL; K.E. SANDERS; M.A. SARVER; P.K. SCHAKE; J.W. SCHOLTZ; A.H. SCHELINE; M.L. SHERRY; F.R. SHUSS; W.W. SIMPSON; A.E. SIX; J.E. SMITH; E.H. SPAZIANI; W.H. STEPHENS; C.D. STROSNIDER; J.F. SUFFOLETTA; H.L. TAYLOR; K.E. THOMAS; F.S. THORNBERRY, JR.; J.R. TICE; D.A. TOWNLEY; R. TRBOVICH; R.T. TURNER; H.B. VAN FOSSEN; R.R. VLAH; A. VRANES; S. VRANES; D.W. WARE; K.G. WASSMAN; G.T. WEEKLEY; E.M. WERRIES; D.L. WESTFALL; J.A. WHITEHEAD; R.J. WHITTEN; C.K. WILDMAN; T. WILLIAMS, JR.; T.H. WILLS; A.J. YANNI; L.H. YOUNG, JR.; R.C. YOUNG; H.F. YUTE,

Appellants/Cross-Appellees,

v.

COLT INDUSTRIES OPERATING CORPORATION, informal plan for plant shutdown benefits for salaried employees and Colt Industries Operating Corporation Plan for maintaining benefits for salaried employees in parity with benefits granted to union represented employees,

Appellee/Cross Appellant.

Argued May 3, 2001
Filed Aug. 10, 2001

Before NYGAARD, WEIS, *Circuit Judges*, and KAUFFMAN [1], *District Judge*.

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[1] The honorable Bruce W. Kauffman, United States District Judge for the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

WEIS, *Circuit Judge*.

In this appeal we determine that a ruling on a statute of limitations issue in a declaratory judgment action had preclusive effect despite the fact that other requests for a declaration were denied because of unresolved factual matters. As a consequence, the District Court erred in applying a different limitations period in a related ERISA case and barring the claims of some of the employee plaintiffs. We also conclude that the District Court properly found that an ERISA plan was in existence and provided benefits for employees at the time of a plant shutdown. Accordingly, we will reverse in part, and affirm in part.

Plaintiffs are former non-union salaried employees of Crucible, Inc. who worked at one of the company's steel manufacturing facilities in Pennsylvania that closed in 1982. Most of the plaintiffs were at the Midland plant, and most were terminated that year, with a few remaining in their positions until as late as 1986. In 1982, Crucible changed its name to Colt Industries Operating Corporation, which today is a dormant corporation. We described in detail the background facts leading up to this litigation in *Henglein v. Informal Plan for Shutdown Benefits for Salaried Employees,* 974 F.2d 391, 395-96 (3d Cir.1992) ("*Henglein I* "), and need not repeat them here.

The employees first filed suit against the employer in August, 1983, presenting a number of claims. Those for shutdown benefits were dismissed on appeal because the

complaint failed to name the proper defendant. *Schake v. Colt Indus. Operating* Corp., No. 85-3381 (3d Cir. May 14, 1986).[2]

In September 1986, the employees filed the present action ("*Henglein*") under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), against two plans alleged to be administered by Colt, an "Informal Plan" and a "Parity Plan." The complaint alleged that plaintiffs were entitled to shutdown benefits pursuant to an Informal Plan that was created by Crucible's 1962 plan, and amended by 1968 and 1969 documents. In addition, some of the employees sought a $400 monthly supplement under the so-called Parity Plan.

As described in the complaint, the Informal Plan provided plant closing benefits for older, long-time employees who had not yet qualified for 30-year pension benefits under the company's Formal Plan. These supplemental benefits were to be paid monthly until the recipient reached the age when Social Security benefits became available. The claim for Parity Plan benefits was based on management's alleged promise to equalize plant shutdown benefits between union and non-union employees.

Rather than answering the employees' complaint, Colt in its capacity as administrator of the putative Plans, filed a declaratory judgment action seeking rulings that the Informal Plan and Parity Plan did not exist, and the employees' rights

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[2] The closing of the Crucible plants generated an unusual amount of appellate litigation. *See Schake v. Colt Indus. Operating Corp.*, No. 85-3381, (3d Cir. May 14, 1986); *Anthuis v. Colt Indus. Operating Corp.*, 789 F.2d 207 (3d Cir. 1986); *Ashenbaugh v. Crucible Inc., 1975 Salaried Ret. Plan*, 854 F.2d 1516 (3d Cir.1988); *Frank v. Colt Industries, Inc.*, 910 F.2d 90 (3d Cir.1990); Henglein 1, 974 F.2d 391 (3d Cir. 1992); *Henglein v. Informal Plan for Plant Shutdown Benefits for Salaried Employees*, No. 93-3219, (3d Cir. Jan.13, 1994) ("*Henglein II*"); *Henglein v. Informal Plan for Plant Shutdown Benefits for Salaried Employees*, No. 94-3074, (3d Cir. Sept.26, 1994) ("*Henglein III*").

to a pension were governed solely by the Formal Plan in effect in 1982. The District Court stayed the employees' action and proceeded with the declaratory judgment.

In November 1988, the District Court ruled that there was no Parity Plan, and that the statute of limitations for the employee claims was six years. *Colt v. Frenn,* No. 86-2642 (W.D. Pa. Nov.30, 1988). Colt's counts seeking declarations of the non-existence of other benefit plans were dismissed because unresolved material issues of fact precluded summary judgment. Id. Neither party appealed.

The employees' suit (*Henglein*) then resumed. After taking testimony, the District Court ruled that it lacked subject matter jurisdiction because the employees had failed to prove that an Informal Plan existed under ERISA. On appeal we reversed and remanded for fact-finding to determine whether the alleged Informal Plan straddled the enactment of ERISA. We also held that the employees were collaterally estopped from raising the Parity Plan matter because of the ruling in the *Frenn* declaratory judgment. *Henglein I*, 974 F.2d at 402.

Extensive District Court proceedings that followed resulted in two more appeals to this Court. *Henglein II*, No. 93-3219 (3d Cir. Jan. 13, 1994); *Henglein III*, No. 94-3074 (3d Cir. Sept. 26, 1994). In both instances, we remanded for additional consideration by the trial court. During the pendency of the third appeal, the district judge who had presided over the litigation retired; on remand another judge was assigned the case. Following a bench trial, the second judge filed extensive findings of fact and conclusions of law, and entered the judgment now on appeal. We will summarize the District Court's findings.

Evidence of the employer's representations and conduct extended from before the 1975 effective date of ERISA up until the time the claims arose in 1982. In 1968 Crucible adopted an "Early Severance and Disability Program." This document and a memorandum were distributed to the em-

ployees. The 1968 Plan was amended in 1969 by the "Hardship Retirement Guidelines," which, however, was not generally distributed to the employees. In 1972, a board of directors resolution purported to rescind the 1968 Early Severance And Disability Programs. No notice of this action was given to the employees.

In 1972, Crucible amended and rewrote its retirement plan entitled "Crucible Inc. Retirement Plan for Eligible Salaried Employees." It was printed in booklet form and circulated to all salaried non-union employees. Various amendments were made by the "1975 Salaried Retirement Plan," which the employees received in 1976. Those booklets failed to contain any statement that the employees' benefits were limited to those described therein.

Crucible never issued to its employees in general any written notice that the 1968 and 1969 Early Severance and Disability Benefit Programs had been rescinded. In a 1973 memorandum, E.A. March, Group Vice President of Crucible, Inc. wrote to division presidents, controllers, personnel directors, and the retirement board informing them that "there is no 'Informal Pension Plan' to which new names can be added." When advising the vice president of Employee Relations for the Midland plant of this news, March directed, "I don't want anyone to talk about it."

Three Crucible vice presidents who served as members of the executive committee were never informed about the cancellation of plant shutdown compensation for salaried employees. John Vensel, president of Crucible's Alloy Division at Midland, Pennsylvania, testified to his belief that shutdown benefits for salaried employees were in existence in 1982. Vensel also told the employees he supervised that the benefits were available.

At various meetings during 1969 through 1982, senior members of Crucible management told salaried employees that their benefits would always equal or exceed in value

those extended to union members. The employees believed this meant they would receive additional compensation in the event of plant shutdown.

In conformance with its factual findings, and following this Court's legal analysis in the three appeals, the District Court concluded that the Informal Plan for Shutdown Benefits for Salaried Employees was a defined benefit employee plan at the time of the shutdown in 1982, and was governed by the 1968 "Early Severance and Disability Benefit Plan" as amended by the 1969 Hardship Benefits Program. The Court also observed that the employees met the requisite age and service criteria.

However, in considering an issue not raised in any of the appeals, the Court concluded that the applicable statute of limitations was three years. As a consequence the claims of all but six of the 164 plaintiffs were time-barred.

In accordance with the parties' stipulation, the claims of the six individuals were referred to the Plan administrator for calculation of the benefits due. The Court approved the awards to five of the employees, but disagreed with that of the sixth employee, E.P. Fahnert, who was granted monthly payments to age 65. Reviewing the administrator's calculations, the District Court focused on the 1969 Plan's use of the term "life income" and modified Mr. Fahnert's award, directing that the payments continue for his lifetime.

In reviewing the claims to the Parity Plan benefits, the District Court reaffirmed the prior dismissal in accordance with the directive in *Henglein II*.

Both parties have raised substantial issues on this appeal. The employees challenge the ruling on the three year statute of limitations, contending that the six year period set out in *Colt v. Frenn* controls. They also renew their claims for "parity payments" and assert that the Plan administrator used

an inappropriate basis for determining the amounts due the successful plaintiffs.

The Plans defend the three year statute of limitations ruling, but in their cross-appeal contend that the District Court erred in allowing Fahnert a "double recovery." The Plans also challenge the calculation of the benefits payable.

I.

This case comes to us after a non-jury trial. We review the findings of fact under the clearly erroneous standard, Fed. R. of Civ. Proc. 52(a), and the conclusions of law de novo. *Gregoire v. Centennial School Dist.*, 907 F.2d 1366, 1370 (3d Cir. 1990). The statute of limitations is the predominant issue in this case, and we will therefore address it first.[3]

The parties agree that ERISA contains no statute of limitations applicable to the controversy at hand, and conducted the litigation on the premise that the court should look to the most analogous state provision, in this case that of Pennsylvania.[4] According to the Plans, the Wage Payment

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[3] The plaintiffs in *Henglein* were the same as those who had previously been parties in the *Schake* case, which was filed within the three year limitation. Had the Plans been joined in the *Schake* case after this Court had dismissed the relevant counts in that litigation, the relation back provisions of Federal Rule of Civil Procedure 15(c) would have eliminated the statute of limitations problem. Plaintiffs, however, chose to file this separate *Henglein* case more than the three years after the 1982 plant closings.

[4] We therefore do not discuss the doctrine of laches under the law of trusts. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989) ("ERISA abounds with the language and terminology of trust law. . . . In determining the appropriate standards of review for actions under § 1132(a)(1)(B), we are guided by principles of trust law."). It appears that the overwhelming majority of Courts of Appeals apply a statute of limitations in claims under ERISA § 502(a)(1)(B).

and Collection Law, Pa. Stat. Ann. tit. 43, §§ 260.1-12, fills the gap. That statute defines wages to include fringe benefits due under ERISA plans, and establishes a three year statute of limitations. Pa. Stat. Ann. tit. 43, §§ 260.2a, 260.9a. The Plans cite *Syed v. Hercules Inc.*, 214 F.3d 155, 159-62 (3d Cir.2000), *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1181 (3d Cir.1992), and *Vernau v. Vic's Market, Inc.*, 896 F.2d 43, 45 n. 3 (3d Cir.1990), as supporting a three year limitations period for this case. The Plans argue that despite its ruling in *Frenn,* the District Court was obliged to apply the shorter statute of limitations in the *Henglein* suit.

As noted earlier, the declaratory judgment action was brought by Colt as Plan administrator, against Frenn and one other employee, both named as plaintiffs in the then-pending Henglein action. The complaint sought a declaration that the Informal Plan and the Parity Plan did not exist, and, therefore, the Henglein case should be dismissed. In response, the employees sought summary judgment on the basis that the Informal Plan and Parity Plan were in effect in 1982. Both parties to the declaratory judgment suit were represented by the same attorneys who appeared in the *Henglein* case. There can be no question about privity or identity of issues in the two cases.

As we mentioned previously, the first judge made several rulings in the declaratory judgment action. Finding that a Parity Plan did not exist, he entered judgment against the employees on that claim. Whether the Informal Plan was properly terminated in 1972, and whether it existed after ERISA was enacted, however, depended upon disputed issues of fact. Therefore, the Court denied the cross-motions for summary judgment and dismissed the requests for declarations on those points.

The district judge then turned to the question of the employees' timeliness in filing the Henglein case: "Finally, [Colt] contends that the Henglein action is time-barred."

After some discussion the judge concluded that "the accrual of the statute of limitations did not begin until 1982." Next, he determined that the Pennsylvania six year statute of limitations for actions on contracts was applicable. "Here, the [employees] initially brought the Henglein suit in 1986. Therefore, the [employees] properly brought this suit within the applicable limitations period." [5]

II.

Although the Plans did not take an appeal from the Frenn declaratory judgment, they contend that the ruling on the statute of limitations issue should not be given preclusive effect. They correctly identify the standard requirements for collateral estoppel, more generally, termed issue preclusion: "(I) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action." *Raytech Corp. v. Mite*, 54 F.3d 187, 190 (3d Cir.1995); *see also* Restatement (Second) of Judgments § 27 cmt. j (1982); *Henglein I*, 974 F.2d at 402; *Temple University v. White*, 941 F.2d 201, 212 (3d Cir.1991); *Arab*

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[5] The ruling on the statute of limitations, although quite forthright in the memorandum opinion of the District Court, was not repeated in the judgment itself. The parties have not raised the issue of non-compliance with Federal Rule of *Civil* Procedure 58, requiring that judgments be set forth on separate documents. We merely note the point to observe that better practice would have been to follow the rule. In any event, violations of Rule 58 are not jurisdictional and may be waived. *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978) (per curiam); *see also Buck v. U.S. Digital Communications, Inc.*, 141 F.3d 710, 711 (7th Cir. 1998) (if terms of declaratory relief appear in the opinion, final decision has been reached); *Metzl v. Leininger*, 57 F.3d 618, 619-20 (7th Cir. 1995).

African Intern. Bank v. Epstein, 958 F.2d 532, 535 (3d Cir. 1992); *Gregory v. Chehi*, 843 F. 2d I 11, 121 (3d Cir. 1988).

Preliminarily, we observe that much of the Plans' argument rests upon a concept of "finality" that is unduly rigid. In *Dyndul *210 v. Dyndul*, 620 F.2d 409 (3d Cir.1980) (per curiam), we commented that "'[flinality' for purposes of issue preclusion is a more 'pliant' concept than it would be in other contexts." *Id.* at 412 (footnote omitted). We quoted approvingly from Judge Friendly's opinion in *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2d Cir.1961): "'Finality' in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." *Id.* at 412 n. 8.

In *In re Brown*, 951 F.2d 564, 569 (3d Cir. 1991), we made the point clearly: "[u]nlike claim preclusion, the effectiveness of issue preclusion, sometimes called collateral estoppel, does not require the entry of a judgment, final in the sense of being appealable." We also cited section 13 of the Second Restatement of Judgments, which states that "for purposes of issue preclusion, . . . 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." *Id.*; *see also Hawksbill Sea Turtle v. Federal Emergency Mgmt. Agency*, 126 F.3d 461, 474 n. 11 (3d Cir. 1997); Restatement (Second) of Judgments § 27 cmt. k.

We need not, however, rely on those applications of the "finality" factor because here the basis is an even more compelling one, the actual entry of a final judgment.

A. Appealability

In *Henglein I*, we observed that the employees did not appeal *Frenn's* unfavorable ruling on the Parity Plan. 974 F.2d at 402. Because they did not do so, we held that "the district court's ruling that a Parity Plan did not exist was a

final judgment on the merits," and collateral estoppel barred further litigation on that issue. *Id.*

Despite the clear language in *Henglein I*, the Plans argue that they could not have appealed the *Frenn* judgment because the District Court's dismissal of the Informal Plan count based on unresolved factual issues was an interlocutory order. The Plans say also that they could not have appealed because the ruling on the Parity Plan was in their favor.

The Plans' arguments fail to appreciate the unique nature of a declaratory judgment action. In a case of actual controversy, the Declaratory Judgment Act provides that a court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." 28 U.S.C. § 2201

Once a judgment disposing of all issues on which the parties sought a declaration is entered by a court, the case is ripe for appeal. Even if the court decides in its discretion that it will not entertain the case in any aspect whatsoever, that ruling is subject to appeal. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995) ("In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration."); *see also Exxon Corp. v.* F.T.C., 588 F.2d 895, 900-02 (3d Cir. 1978).

Because it has discretion to decline jurisdiction over a declaratory judgment action in its entirety, it follows that a court may decide some of the issues raised and refuse to rule on others. The maxim that the greater includes the lesser applies; if the court may choose to rule on all or none of the issues presented, it may decide only those it finds appropriate for a declaration.

Once a district court has ruled on all of the issues submitted to it, either deciding them or declining to do so, the declaratory judgment is complete, final, and appealable. Nothing remains for the trial court to do and the case is at an end in that forum. *See Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945).

We would not be understood to say, however, that every ruling in a declaratory judgment is immediately appealable. In *Peterson v. Lindner*, 765 F.2d 698 (7th Cir. 1985), the trial judge entered an order on one phase of a declaratory judgment action, but specifically left open significant issues relating to damages and other relief. Moreover, he did not enter a formal judgment. *Id.* at 701-02. In those circumstances, the Court of Appeals held that the order was interlocutory and non-appealable. *Id.* at 702-04. Similarly, in *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 742, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976), the Supreme Court noted that an order establishing liability, even if considered as a declaratory judgment, was not final where the trial court had not ruled on the injunction and damages that had been requested. That, however, is not the situation here where the court issued a judgment and a ruling on every issue submitted.

The normal civil action differs from the declaratory judgment in that courts deciding the latter are not required to adjudicate the ultimate dispute between the parties. Consequently, the disfavor generally shown to appeals from partially dispositive orders in the usual civil action, *see, e.g.*, Fed. R. of Civ. Proc. 54(b), is not present once a declaratory judgment has been entered. In this sense, some "loose ends" in the underlying controversy that would negate finality for appellate purposes in most civil actions, do not have that effect in the declaratory judgment setting. *See also* Restatement (Second) of Judgments § 33 cmts. b, e (noting that if declaratory judgment is valid and final, it is conclusive with respect to matters declared).

In *Frenn*, the District Court could have chosen to decide all of the issues, including resolution of the contested factual issues on the existence of the Informal Plan. It is understandable that the Court did not do so, more than likely believing that the disputed factual matters were at the heart of the *Henglein* case and would be better resolved in that litigation.

The Plans' arguments dance nimbly around the fact that the determination of the statute of limitations was adverse to them, and was independent of the ruling on the unresolved factual disputes. If, in the main *Henglein* case, the Plans had moved for summary judgment alleging nonexistence of the Informal Plan, an order denying the motion because of the presence of factual disagreement would have been interlocutory and non- appealable order. But since the Plans chose to use the declaratory judgment vehicle, they are bound by its differing characteristics as to finality.[6]

B. Necessity

Generally, to have preclusive effect, the challenged ruling must be necessary to the prior judgment. Multiple issues are frequently presented in declaratory judgment actions, however, and on appeal all of those decided lie within the scope of review. The Plans, nonetheless, contend that the statute of limitations decision was entirely irrelevant and unnecessary

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[6] The fact that a declaratory judgment may be used by a party to, in effect, make an end run around the non-appealability of otherwise interlocutory orders in existing litigation may be a factor counseling a district court to decline to entertain such a case. *See* James W. Moore, 12 *Moore's Federal Practice* § 57.42[3] n. 36 (Matthew Bender 3d ed.2001) (piecemeal litigation not favored). We are not called upon to decide whether the District Court should have refused to decide the declaratory judgment action in view of the pending *Henglein* case in the same court raising the same issues.

to the ruling on the Informal Plan because "some plaintiffs had filed timely claims even under the three year statute."

The fact that the 158 employees would have been barred by a shorter period demonstrates that the limitations question was a substantial one for both parties. In addition, the issue was separable from the others presented, and potentially dispositive. Therefore, the decision to resolve the question in the declaratory judgment was appropriate. It does not matter if the limitations period was irrelevant in part to some other phases of the case.

The necessity principle has diminished importance in the declaratory judgment setting. Charles A. Wright, Arthur R. Miller & Edward H. Cooper make the reasoning for this clear:

> "Multiple findings also may figure in declaratory judgment actions. Since the very purpose of declaratory relief is to achieve a final and reliable determination of legal issues, there should be no quibbling about the necessity principle. Every issue that the parties have litigated and that the court has undertaken to resolve is necessary to the judgment, and should be precluded."

18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 4421 (1981).

In this case, each individual ruling on the multiple issues presented was subject to appeal and preclusive effect. Because the Plans were free to appeal the ruling on the six year statute of limitations, and having failed to do so, they are bound by it, and precluded from attempting to secure a more favorable ruling at this late date.

C. Actually Litigated

The Plans' final objection--that the issue was not actually litigated—is belied by the District Court's specific statement in its Memorandum Opinion, "[[f]inally [Colt] contends that

the *Henglein* action is time-barred. . . ." The opinion then discussed both the question of when the cause of action accrued and the choice of the most analogous state limitation period. We have no doubt that the statute of limitations was contested and was done so at the instance of Colt as administrator of the Plans.

D. Unmixed Question of Law

As a final matter, we address briefly an exception to normal application of issue preclusion called the "unmixed question of law" reservation, articulated in *United States v. Moser*, 266 U.S. 236, 242, 45 S.Ct. 66, 69 L.Ed. 262 (1924). There, the Court wrote that res judicata "does not apply to unmixed questions of law." *Id.*; *see* Restatement (Second) of Judgments § 28(2).

This exception has been discussed by courts, but none has yet delineated its boundaries very well. *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 170, 104 S.Ct. 575, 78 L.Ed.2d 388 (1984). Significantly, the Supreme Court has "had no trouble finding [the exception] inapplicable [where there is] close alignment in both time and subject matter" between the two cases. *Id.*

Because the declaratory judgment addressed the same facts and claims between the same parties, there was precise alignment between the decision in *Frenn* and the pending *Henglein* case. To recognize an exception in these circumstances would eviscerate the doctrine of issue preclusion.

We conclude, therefore, that the holding in *Frenn* precluded the *Henglein* parties from relitigating the six year statute of limitations. Consequently, the second judge erred in subsequently holding that the employees' claims in *Henglein* were time-barred by the three year statute of limitations.

III.

Because the District Court concluded that a three year period applied, it had no occasion to address the question of whether a group of employees who joined the suit after 1988 were barred by the six year statute of limitations.[7] The arguments as to these employees are the same, however, as were considered by the Court with respect to application of the three year limitation: that the statute of limitations was tolled, and that the application of the .continuing violation" theory would permit recovery. *See Meagher v. International Ass'n of Machinists and Aerospace Workers Pension Plan*, 856 F.2d 1418, 1423 (9th Cir. 1988).

In its general discussion of the statute of limitations issue, the District Court concluded that there had been no tolling because at the time the employees were terminated, they were advised that they would not receive shutdown benefits. According to the Court, the statute of limitations began to run at the time of that notice. *See Adamson v. Armco, Inc.*, 44 F. 3d 650, 653-54 (8th Cir. 1995).

The employees also contended that the Plans were guilty of a continuing violation that extended the limitations period, but the Court concluded that that theory was not applicable.

The employees asserted that the Plans had an obligation to provide benefits through a series of monthly payments. In effect, such obligations are similar to installment agreements, or as some courts have termed them, "continuing contracts." An agreement to provide support for life may be termed a

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[7] Our review of the District Court's record discloses that the employees in this category are Ronald A. Montgomery, Michael Druga, William Hyams, David A. Nobers, Patrick F. McNichol, Alexander Urames, Henry B. Van Fossen, Ezra E. Vest, and Sylvester Vranes.

continuing contract, and so may be an insurance policy to pay a monthly sum of money during a period of disability.[8]

The recurring question with such agreements is whether failure to pay each installment establishes a separate cause of action on each occasion a payment is withheld, or whether only one cause of action accrues for breach of the contract. *Corbin on Contracts* devotes substantial discussion to the subject and suggests simply that much depends on the circumstances. The treatise pithily comments, "'[a]ccrual of the cause of action' has not one eternal and exclusively correct meaning, ordained by God or by the legislature. There is no 'infallible logic' that compels one application rather than another." 4 Arthur L. Corbin, *On Contracts § 989*, at 969 (1951).

In *Vernau*, this Court considered whether the statute of limitations barred a non-fiduciary claim for past due employer contributions to a pension fund. We concluded there was no tolling because plaintiffs had not been reasonably diligent. 896 F.2d at 45-47. The question of accrual in *Vernau* was raised only in connection with the tolling argument, but we noted that even if each delinquency gave rise to a separate claim, the plaintiffs were on "inquiry notice" that the terms of the plan had been breached. *Id.* at 46-47.

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[8] As we observed in *Henglein I*, the definition at 29 U.S.C. § 1002(l) does not point to state contract law to determine whether a plan existed at the time ERISA was enacted. 974 F.2d at 398. There is no inconsistency, however, once a plan is established in analogizing to contract law to determine whether a plaintiff may "recover benefits due to him under the terms of his plan 29 U.S.C. § 1132(a)(1)(B); *see Tester v. Reliance Standard Life Ins. Co.*, 228 F.3d 372, 375 (4th Cir.2000) ("In reviewing the terms of an ERISA plan, we are mindful that ERISA plans are contractual documents, and established principles of contract and trust law govern their interpretation.").

Two years after *Vernau*, we had occasion to again consider the proper statute of limitations in a section 502(a)(1)(B) ERISA claim. In *Gluck*, we noted that differing factual situations require consideration of varying periods, and that the controlling limitations period in *Vernau* should not be "rotely" applied. *Gluck*, 960 F.2d at 1179-82. As an example, we commented on the incongruity of classifying future benefits as "wages" under the Pennsylvania Wage Payment and Collection Law, "because it provides no period of repose to an employer." *Id.* at 1181. A current claim for an ERISA violation affecting the retirement benefit of a hypothetical twenty year-old employee thus might accrue at age 65. *Id.* The opinion stated, "we are unwilling to open the door to a 48-year limitations period." *Id.*

Although neither of these cases squarely addressed the continuing violation theory, both pointed to problems inherent in such an approach. In the circumstances here, where there was an outright repudiation at the time the employees' services were terminated, it is reasonable to expect that the statute of limitations began to run at that point.[9] We conclude that the District Court correctly rejected the tolling and continuing violation theories.

Other facts not revealed by the record before us, however, might be relevant in the late-comers' claims. The parties have not advised us of circumstances that may have affected timeliness of those claims. Moreover, because the District Court ruled that the three year limitation applied, it had no occasion to consider the status of the employees who joined

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[9] A similar result would obtain under trust law. *See* Restatement (Second) of Trusts § 219(2) (1959) ("The beneficiary is not barred merely by lapse of time from enforcing the trust, but if the trustee repudiates the trust to the knowledge of the beneficiary, the beneficiary may be barred by laches from enforcing the trust.").

the *Henglein* litigation after the six year period. We, therefore, must remand this particular matter to the District Court for resolution.

IV.

The language of the 1968 Early Severance Plan incorporated by reference the administrative provisions found in the text of the 1957 Restated Employee's Retirement Plan. Both documents refer to an entity called the "Retirement Board," which was directed to calculate benefits due. Based on that finding, the District Court instructed the Board to interpret the provisions of the Plans in light of all the circumstances and such other evidence of the intention of the sponsor as was not inadmissible.

The employees do not object to the general standard set by the Court, but do challenge the findings that the applicable formulas were those found in the 1957 Plan. According to the employees, the Court should have looked to the Formal Plan in existence in 1982, which was more favorable to them.

The employees did not raise this issue in the District Court and, therefore, we need not consider it now. But we do observe that the 1968 and 1969 documents did not provide for incorporation of plan provisions that might exist at some future time.

Although the employees contend that the benefits due should take account of the inflation that occurred between 1972 and 1982, the District Court correctly pointed out that there was no basis in the plan provisions for such an adjustment. The courts are not at liberty to rewrite the terms of an ERISA plan. *Ryan v. Federal Express Corp.*, 78 F.3d 123, 126 Od Cir. 1996).

We conclude that the District Court properly approved the calculations by the Retirement Board based on the references to the 1957 Plan and we will affirm the awards granted to five of the employees. We do not, however, approve the ruling as to Mr. Fahnert.

V.

In reviewing the claim of E.P. Fahnert, the District Court rejected the retirement board's calculation. Because he had not reached the eligibility age, Mr. Fahnert was not eligible for early retirement under the 1957 Plan. Therefore, using the terms of the 1969 Severance Plan, the Board calculated his claim as a specified reduction of the normal monthly retirement benefit, to be paid from the time of the plant shutdown until he reached the age of 65.[10] At that point he would be eligible for 100 percent of the normal retirement benefit and the severance benefit would cease.

The District Court noted that the 1969 Plan provided for a "life income starting immediately and actuarily reduced under the Restated [1957] Plan." Finding no ambiguity, the Court directed that Mr. Fahnert receive the severance benefits for the remainder of his life in addition to a pension under the Formal Plan. The net result would be that Mr. Fahnert would receive 100 percent of the normal pension at age 65, plus the actuarily reduced severance benefit.

The District Court's interpretation is inconsistent with the provisions of the plan documents when read as a whole. The 1969 Plan refers in several instances to the Restated Formal Plan of 1957, and it is apparent that the benefits under the two plans are to be coordinated.

In the event of plant shutdown, the 1969 Plan granted a beneficiary the right to an immediate actuarily reduced pension based on what he would have received at age 65. The Plan appendix sets out the amounts applicable for various age and service categories and further provides that a portion of early retirement pay is to be paid through the 1957 Restated Plan and part by the 1969 Plan.

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[10] Specifically, benefits began the fourth month after shutdown and continued until the 3rd month following his 65th birthday.

The appendix explains that the percentages were calculated so that the employees would receive exactly the same income" under the 1969 Plan that they would receive under the new vesting provisions. "[N]o additional value" was thus provided. "The only thing which the Guidelines provide for the employees in this portion of the table is a right to receive immediately an income which is the actuarial equivalent of the income which they would otherwise receive only at age 65."

Reduced to its simplest terms, the 1969 Plan provides that in the event of plant shutdown, a person in Mr. Fahnert's position would immediately receive a reduced pension until reaching the age of sixty-five, at which time the full permanent pension would commence. In Mr. Fahnert's case, the reduced pension was $396.89, which was 92.3 percent of his normal age sixty-five pension of $430 per month. Because he was not eligible for early retirement under the 1957 Restated Plan, none of those benefits could come from that source.

We conclude that, read in its entirety, the 1969 Plan's provision for a "life income" incorporates the interim payments followed by the normal retirement payments commencing at age sixty-five for the lifetime of the employee. That being so, the District Court's award of the supplemental benefits for life was not supported by the 1969 Plan's provisions. Accordingly, the Court's order in favor of Fahnert will be modified to reinstate the retirement Board's award in the amount of $53,183, representing the total amount of the severance pension he would have received until age 65. To this sum shall be added accrued interest.

VI.

In their brief, the employees devote considerable discussion to their alleged rights to supplemental payments under the so-called "Parity Plan." But that claim was rejected in

Frenn and just as the employees are entitled to invoke issue preclusion on the statute of limitations count, so are they bound by the declaratory judgment on the Parity Plan claim. We made that point clear in *Henglein I*, directing that "[o]n remand the district court should dismiss the Parity Plan claim on the merits." 974 F.2d at 402. The employees have given us no basis to reconsider that ruling.

VII.

After a lengthy trial, and following the approach used in *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982), as we directed in *Henglein I*, *Henglein II*, and *Henglein III*, the District Court determined that the 1968 and 1969 Hardship Plans were in existence in 1982. When the plant shutdown occurred thereafter, the non-union salaried employees became entitled to benefits under those arrangements.

The Plans again repeat their arguments that the Crucible severance benefits were abolished before ERISA came into existence. These contentions, however, simply reiterate the points unsuccessfully advanced in *Henglein I*, *Henglein H*, and *Henglein III*.

The Plans' position has been effectively undermined by the comprehensive findings of fact by the District Court which are supported by the record. They establish that Crucible established a benefits plan in 1968 which it published and distributed to its employees. In the following year that Plan was amended, but that fact was deliberately not made known to the employees. Similarly, in 1972, the Board of Directors purported to abolish the Informal Plan but concealed that action from the employees.

Despite these surreptitious attempts to revise and revoke the benefits plans, company executives continued their oral representations that benefits were available for the employees. Indeed, in recruiting union workers to accept salaried

positions, superintendents consistently promised that benefits would equal or exceed those established by collective bargaining agreements.

In its publication of Formal Plans in 1972 and 1976, the Company did not state that those booklets described all of the benefits available. To the contrary, company executives in the years following told the employees that shutdown benefits not mentioned in those publications were available. We find no error in the District Court's conclusion that a shutdown benefit plan was in effect in 1982.

VIII.

The case will be remanded so that the District Court may award benefits due for those employees who qualify under the six year statute of limitations. The District Court's order of August 23, 2000 establishing benefits for Fahnert will be modified and the Retirement Board's calculation of $53,183 plus interest will be reinstated. The Court will also determine whether any of the employees who joined the litigation at a later stage are entitled to recover, and if so refer the claims to the plan administrator for appropriate computations. In all other respects, the judgment of the District Court will be affirmed.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Appellate Docket Nos. 00-2529 and 00-2746

GEORGE W. HENGLEIN, L.C. ALBACKER, R.B. ANDREWS, R.L. APPELDORN, R.H. ASHENBAUGH, A.L. AUSTIN, J.W. BAGOSI, J.D. BALSER, A. BARRASSO, J.O. BAUER, E.E. BEST, H.W. BIGLEMAN, C.R. BLAZIER, J.P. BRESSANELLI, G.D. BROWN, F.C. BUCHHOLZ, E.C. CALVIN, R.R. CAMPBELL, P.D. CASTELLANO, J.L. CERASI, E. CHAPMAN, S. CHRISTY, T.M. COSTELLO, C.A. DAUKA, A.J. DECOSTA, M.G. DEGRANDE, A.S. DICCIO, A.P. DIMARZIO, C.J. DIMARZIO, R.J. DOUGHERTY, M. DRUGA, E.P. ERATH, E.P. FAHNERT, H. FARRINGTON, M. FERLAINO, R.D. FEYDO, E.R. FINGER, J.N. FLARA, N.E. FREDERICK, J.P. FRENN, R.E. FRONKO, L.L. GIBBS, W.L. GLEASON, L.E. GORDON, R.W. GOTT, J.E. GRIMM, P.E. GRUBBS, E.R. GUERRA, A.J. GULUTZ, J.T. HAAF, J.D. HAMACHER, P.J. HANNON, R.M. HANSEN, M.I. HARPHAM, D.H. HELDMAN, J.K. HILE, R.S. HOGSETT, R.T. HOPPER, H.M. HOWELL, W.M. HYAMS, J.M. JANKE, C.L. JOBE, JR., K.H. JOHNS, R.O. JOHNSON, JR., E.T. JONES, R. KAO, D.P. KERR, JR., P.A. KEYS, R.W. KNALLAY, E.E. KNAPEK, W.J. KOFALT, S.W. KOHLER, T. KOMINITSKY, T.R. KRUPA, P.R. KULLEN, J.R. KUNDICK, W. LAKE, D.F. LAVENE, T.T. LEHMANN, R.H. LEWIS, R.A. LIPPERT, W.R. LIVINGSTON, J.H. LUTTON, A.J. LYNN, D.B. MCCLAIN, J.L. MCKAIN, P.F. MCNICOL, E.L. MARSH, F.S. MATSUKAS, H.J. MERCER, A.R. MIDDLETON, M. MITROVICH, M.A. MOLCHAN, R.A. MONTGOMERY, R.T. MORELLI, A.N. MORRISON, H. MRAUNAC, M.R. MUCKIAN, C.W. MURRAY, III, C.J. MYERS, L.V. NAGLE, D.A. NOBERS, J.A. NUZO, E. ORDICH, W.H. ORR, T.H. PARSONS, A.J. PASKO, JR., H.S. PEASE, III, G.J. PESCION,

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Appellants/Cross Appellees,

VS.

COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES,

Appellee/Cross Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. NO. 86-2021)

THE EMPLOYEES' PETITION FOR REHEARING BY THE PANEL

I express a belief, based on a reasoned professional judgment that the criteria of rule 3 5 (b) (I) are met.

This petition is limited to two determinations by the Panel:

1. That the Employees had failed to raise the issue of which formal plan was to interrelate with the administration of the Informal Plan before the District Court and that, therefore, the Panel need not consider that issue,

2. In determining that Employee Fahnert was not entitled to Informal Plan Benefits beyond age 65, the Opinion of the Panel could suggest a broadened application to Employees not accorded 100% of formal Plan benefits.

THE ISSUE OF WHICH FORMAL PLAN (THE 1957 OR THE ONE IN EFFECT IN 1982) WAS TO APPLY.

The Conclusion Of Law Six proposed by the Employees in their submittal to the District Court on August 30, 1996 was as follows:

> INFORMAL PLAN BENEFITS ARE TO BE CALCULATED IN CCORDANCE WITH THE PENSION CALCULATION FORMULA OF THE FORMAL PENSION PLAN IN EFFECT IN 1982.

and set forth the support for that Conclusion of Law at pages 54 to 56.

Both the Panel, and the Employees, have been poorly served by the party responsible for misinforming the Panel concerning the efforts of the Employees.

Since the Panel concluded that there was no need for it to consider the issue of the applicable formal pension plan, we assume that it did not consider the sections of the Employees' briefs submitted to it that dealt with that issue.

Rather than attempting to summarize here the substance of the arguments made in those briefs we respectfully refer the

Panel to pages 32 to 38 of the Employees' main brief of October 13, 2000 and to pages 14 through 19 of the Employees' reply brief submitted on March 5, 2001.

THE NEED TO CLARIFY THE COURT'S OPINION IN ORDER THAT THE LIMITATION OF THE 1969 INFORMAL PLAN BENEFITS TO AGE 65 BE RESTRICTED TO EMPLOYEES ACCORDED ENTITLEMENT TO ONE HUNDRED PERCENT OF FORMAL PENSION BENEFITS AT THAT AGE.

If we assume that the 1969 Informal Plan benefits were properly calculated in conjunction with the terms of the 1957 formal pension plan (which had been superseded many years before the 1982 shutdown), we must deal with the benefit entitlements of two distinct groups of Employees:

(1) Those Employees who fall within the group of "Age 50 to 60 and 15 to 30 Years of Service" who were to receive a "life income" but were not accorded a one hundred percent Interest in formal pension plan benefits (1969 Informal Plan at 3) and,

(2) Those Employees entitled to "one hundred percent of 'age 65 income'" i.e., unreduced formal plan benefits whose entitlement is Informal Plan benefits terminated at age 65 (App. I of the 1969 Informal Plan).

This distinction was correctly drawn by the Retirement Committee in its Findings dated (apparently) July 7, 1998. A considerable number of Employees fall within the terms of the first category because of satisfying the age and years of service set forth there but were placed in the second category because of not having attained age 55 as in Fahnert's case. The significance of being younger than age 55 at termination was spelled out by the Retirement Board at page 9 of

Appendix II to its findings "Individual Benefit Calculations" as follows:

> (7) Because Mr. Fahnert had not attained age 55 when his employment terminated, under the terms of the 1957 Formal Plan he could not have commenced his formal Plan pension until age 65. Accordingly, in his case the Informal Plan is required to pay the entire monthly benefit determined under the Hardship Guidelines to age 65.

As Section II of Appendix I of the 1969 Informal Plan provides, at age 65 ail Employee such as Fahnert would be credited with 100 percent of formal plan benefits but to a zero benefit under the Informal Plan. It would appear appropriate that an Employee granted 100 percent interest in a formal plan benefit at age 65 not be accorded additional benefits through the Informal Plan beyond that age.

Employees who were older than age 55, such as Frenn (58.7 years of age) and Hannon (57.39 years of age), did not qualify for the treatment accorded Fahnert, but did qualify for a "life income starting immediately and actuarially reduced under the Restated Plan." (p.3 of the 1969 Plan) Since they were not accorded a 100 percent formal plan benefit, a consequence they would experience throughout their lives, a "life income" under the formal plan would appear fully appropriate. Pages I and 3 of Appendix 11 to the Retirement Board's Findings provide that 1969 Plan benefits which were to be paid to Frenn and Hannon were "for life.'

Paragraph 6 on page 2 of that Appendix II further noted that: "Under the 1969 Plan, the Informal Plan monthly benefit was payable from the 4th month after severance for life."

Respectfully submitted,

/s/ James J. Ahearn
JAMES J. AHEARN
Counsel of Appellants/Cross Appellees
825 B Morewood Avenue
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Date: August 22, 2001.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the within "THE EMPLOYEES' PETITION FOR REHEARING BY THE PANEL" was sent this 22nd day of August, 200 1, by first class U.S. mail, postage prepaid, to the following counsel of record:

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/s/ James J. Ahearn
JAMES J. AHEARN

Dated: August 22, 2001

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Appellate Docket Nos. 00-2529 and 00-2746

GEORGE W. HENGLEIN, L.C. ALBACKER, R.B. ANDREWS, R.L. APPELDORN, R.H. ASHENBAUGH, A.L. AUSTIN, J.W. BAGOSI, J.D. BALSER, A. BARRASSO, J.O. BAUER, E.E. BEST, H.W. BIGLEMAN, C.R. BLAZIER, J.P. BRESSANELLI, G.D. BROWN, F.C. BUCHHOLZ, E.C. CALVIN, R.R. CAMPBELL, P.D. CASTELLANO, J.L. CERASI, E. CHAPMAN, S. CHRISTY, T.M. COSTELLO, C.A. DAUKA, A.J. DECOSTA, M.G. DEGRANDE, A.S. DICCIO, A.P. DIMARZIO, C.J. DIMARZIO, R.J. DOUGHERTY, M. DRUGA, E.P. ERATH, E.P. FAHNERT, H. FARRINGTON, M. FERLAINO, R.D. FEYDO, E.R. FINGER, J.N. FLARA, N.E. FREDERICK, J.P. FRENN, R.E. FRONKO, L.L. GIBBS, W.L. GLEASON, L.E. GORDON, R.W. GOTT, J.E. GRIMM, P.E. GRUBBS, E.R. GUERRA, A.J. GULUTZ, J.T. HAAF, J.D. HAMACHER, P.J. HANNON, J.M. HANSEN, M.I. HARPHAM, D.H. HELDMAN, J.K. [illegible], R.S. HOGSETT, R.T. HOPPER, H.M. HOWELL, W.M. HYAMS, J.M. JANKE, C.L. JOBE, JR., K.H. JOHNS, R.O. JOHNSON, JR., E.T. JONES, R. KAO, D.P. KERR, JR., P.A. KEYS, R.W. KNALLAY, E.E. KNAPEK, W.J. KOFALT, S.W. KOHLER, T. KOMINITSKY, T.R. KRUPA, P.R. KULLEN, J.R. KUNDICK, W. LAKE, D.F. LAVENE, T.T. LEHMANN, R.H. LEWIS, R.A. LIPPERT, W.R. LIVINGSTON, J.H. LUTTON, A.J. LYNN, D.B. MCCLAIN, J.L. MCKAIN, P.F. MCNICOL, E.L. MARSH, F.S. MATSUKAS, H.J. MERCER, A.R. MIDDLETON, M. MITROVICH, M.A. MOLCHAN, R.A. MONTGOMERY, R.T. MORELLI, A.N. MORRISON, H. MRAUNAC, M.R. MUCKIAN, C.W. MURRAY, III, C.J. MYERS, L.V. NAGLE, D.A. NOBERS, J.A. NUZO, E. ORDICH, W.H. ORR, T.H. PARSONS, A.J. PASKO, JR., H.S. PEASE, III, G.J. PESCION, G.V.

PETERSON, J.J. POPP, G.P. PORTO, G. POSTICH, D.E. POWELL, R.W. PRENTICE, J.V. PRESUTTI, W.C. PRICE, L.E. RAYNOVICS, T.R. REED, J.W. REIDER, J.J. ROSE, A.J. ROSEPILLER, C.S. RUSSELL, K.E. SANDERS, M.A. SARVER, P.K. SCHAKE, J.W. SCHOLTZ, A.H. SCHELINE, M.L. SHERRY, F.R. SHUSS, W.W. SIMPSON, A.E. SIX, J.E. SMITH, E.H. SPAZIANI, W.H. STEPHENS, C.D. STROSNIDER, J.F. SUFFOLETTA, H.L. TAYLOR, K.E. THOMAS, F.S. THORNBERRY, JR., J.R. TICE, D.A. TOWNLEY, R. TRBOVICH, R.T. TURNER, H.B. VAN FOSSEN, R.R. VLAH, A. VRANES, S. VRANES, D.W. WARE, K.G. WASSMAN, JR., G.T. WEEKLEY, E.M. WERRIES, JR., D.L. WESTFALL, J.A. WHITEHEAD, R.J. WHITTEN, C.K. WILDMAN, T. WILLIAMS, JR., T.H. WILLS, JR., A.J. YANNI, L.H. YOUNG, JR., R.C. YOUNG, H.F. YUTE, W.I. ZAZWIRSKY, AND JOHN K. DOUGLAS,

Appellants/Cross Appellees

vs.

COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES,

Appellee/Cross Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. No. 86-CV-02021)

Before: NYGAARD, WEIS, *Circuit Judges*, and KAUFFMAN,* *District Judge*

---

* The Honorable Bruce W. Kauffman, United States District Judge for the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

SUR PETITION FOR PANEL REHEARING

The petition for rehearing filed by appellants having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is DENIED.

BY THE COURT:

/s/ _____
United States Circuit Judge

DATED: Oct 23, 2001